United Nations A/CN.4/581

General Assembly

Distr.: General
19 April 2007
English
Original: French

International Law Commission
Fifty-ninth session
Geneva, 7 May-8 June and 9 July-10 August 2007

Third report on the expulsion of aliens

By Mr. Maurice Kamto, Special Rapporteur

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Part One
General Rules (continued)

III. General principles

1. In his second report on the expulsion of aliens (A/CN.4/573), after reviewing recent developments in both national and international practice (paras. 15-35), the Special Rapporteur attempted to define the scope of the topic (paras. 36-41). In Part One of the study on general rules for the expulsion of aliens (paras. 45-122), he focused on determining the main "scope" or even stumbling block of the debate within both the International Law Commission and the Sixth Committee of the General Assembly. He then tried to define more precisely than in his preliminary report (A/CN.4/554) the concepts relating to the topic. Taking into account the comments made by a number of members of the Commission during the consideration of the second report (A/CN.4/573), the Special Rapporteur has decided to use the terms "ressortissant" and "national" of a State as synonyms in this and subsequent reports.

2. This report focuses on the general principles of international law governing the expulsion of aliens. The debate over whether or not the expulsion of aliens relates to international law[1] is a thing of the past: the right of expulsion forms part of the principle of territorial sovereignty. A State's existence depends not only on the existence of a population which recognizes its sovereignty but also, especially, on the existence of a territory in which this sovereignty is exercised exclusively, de facto and de jure. As Rolin-Jaquemyns showed in his report on the right of expulsion of aliens, submitted to the Institute of International Law during its Lausanne session in 1888, this sovereignty would be compromised if it were possible for persons having no political ties to the receiving State — whose home country, in short, was elsewhere — to enter the territory, reside there and defy the local authorities, who would deem this stay to be dangerous or harmful to the country.[2] He drew the following conclusion:

> From the perspective of international law, any Government of a sovereign State, as a general rule if it deems necessary in its own interest, has the right to admit or not admit and to expel or not expel aliens who wish to enter or who reside in its territory as well as to impose conditions on their entry or residence if it deems it necessary in the interest of its tranquillity or domestic or international security, or of the health of its inhabitants.[3]

3. Such a view was in accordance with the prevailing doctrine of the period. Thus, for Darut, the notion of State sovereignty underpins the "rationale for the right of expulsion",[4] a right which had been universally recognized during that period.[5]

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[1] See especially the long discussion on this issue at the Institute of International Law, meeting of 8 September 1891, *Annuaire de l'Institut de droit international*, vol. XI (1889-1892), Hamburg session, pp. 273-320.

[2] Ibid., vol. X, 1888-1889, Lausanne session, p. 230.

[3] Ibid., p. 235.

[4] Joseph-André Darut, *L'expulsion des étrangers. Principe général — Application en France*, Thesis (Aix, 1902), pp.16 and 20.

[5] Alexis Martini, *L'expulsion des étrangers*, Thesis (Paris, 1909), p. 16.

4. Expulsion involves, on the one hand, the fundamental principle of State sovereignty in the international order, which gives the State the power to issue domestic regulations in accordance with its territorial jurisdiction, and, on the other, the fundamental principles underpinning the international legal order and basic human rights which all present-day States must respect. The preamble to the International Rules on the Admission and Expulsion of Aliens, adopted by the Institute of International Law on 9 September 1892, thus postulates the following:

> Whereas for each State, the right to admit or not admit aliens to its territory or to admit them only conditionally or to expel them is a logical and necessary consequence of its sovereignty and independence; whereas, however, humanity and justice oblige States to exercise this right while respecting, to the extent compatible with their own security, the rights and freedom of foreigners who wish to enter their territory or who are already in it; whereas from this international point of view it may be useful to draft in general and for the future some consistent principles, the acceptance of which would not in any case involve any assessment of actions carried out in the past ... .[6]

5. The following sections will therefore consider the linkage between the fact that, on the one hand, the right of expulsion is an established principle of international law and that, on the other hand, such a right must be exercised in accordance with the fundamental rules of international law. This involves building a structure that strikes a balance between the two notions by linking the right of the expelling State with the rights of the expelled person so that the State's sovereign right is exercised in a manner consistent with human dignity.

A. Right of expulsion

6. The right of expulsion provoked lively debate in the late nineteenth century, as the work of the Institute of International Law on the topic demonstrates in particular. Although the question of the foundation of the right to expel was not explicitly raised during this debate, it was nevertheless addressed directly or indirectly, since the assertion of such a right requires a reference to its legal basis in international law or, as appropriate, in domestic law. Such a permissive rule establishing the State's authority or freedom to remove an alien from its territory might at first glance appear to be drawn from general international law in the narrow, traditional sense, i.e., from customary law.

7. Analysis does not bear this out, however. The right to expel is not granted to the State by any external rule; it is a natural right of the State emanating from its own status as a sovereign legal entity with full authority over its territory, which may be restricted under international law only by the State's voluntary commitments or specific *erga omnes* norms. What is involved in this case is only a restriction rather than a condition for the existence of the rule. In other words, the right to expel is a right inherent in the (territorial) sovereignty of the State; but it is not an absolute right, as it must be exercised within the limits established by international law.

[6] *Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, Geneva session, pp. 218-219.

1. An inherent right

8. The existence of a State's right to expel an alien from its territory is uncontested in international law,[7] and it does not appear to have ever raised serious doubt in the literature.[8] This is confirmed by State practice.[9] Moreover, it is enshrined in ample international arbitral case law, particularly in the late nineteenth and early twentieth century, as well as by more recent decisions and case law of human rights commissions and regional courts. Thus, in the *Boffolo* case, the umpire made the following statement: "That a general power to expel foreigners, at least for cause, exists in governments cannot be doubted".[10] The Belgian-Venezuelan Mixed Claims Commission reasoned along the same lines in the *Paquet* case, saying that the "right to expel foreigners from or prohibit their entry into the national territory is generally recognized".[11]

9. The decisions of human rights commissions and the case law of regional human rights courts also recognize the right of expulsion of aliens for the maintenance of public order as an established rule of international law (see A/CN.4/565, para. 190). In this regard, the European Court of Human Rights consistently refers in its case law to

> ... the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens.[12]

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[7] See Giorgio Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, p. 295.

[8] Several writers in the late nineteenth century, including Lord Coke, Sapey, Pinheiro-Ferreira, P. Fiore and Clovis Hugues, believed, in line with the idealistic humanism in vogue during that period, that nothing should encroach on human freedom, and they described the right of expulsion as a gross violation of imprescriptible human rights; see Darut, op. cit., pp. 8-9. Several writers, however, showed during the same period that such a concept was neither legally nor politically tenable (ibid., pp. 10 ff).

[9] In the aforementioned *Cursos* (see footnote 7), Gaja provides three interesting examples of such practice drawn from the *Digest of International Law*, edited by Whiteman (Washington, D.C., 1967), pp. 851, 854 and 861: United States Secretary of State Hull's reiteration in 1939 of his instructions to the Consulate General of the United States of America in France to the effect that the United States "recognised the right of a State to expel aliens considered dangerous to its security and would not intervene in such a case;" the statement made 10 years later by the British Minister of State, Hector McNeil, as follows: "[...] It is, of course, within the rights of the Hungarian Government to expel any foreigner from their country and there seems, therefore, to be no legal ground for an official protest;" a letter from United States Assistant Secretary of State Dutton addressed to a member of Congress in 1961 in which he writes, "[...] it may be pointed out that under generally accepted principles of international law a state may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner [...]."

[10] *Boffolo* case (Italian-Venezuelan Mixed Claims Commission, 1903), *United Nations Reports of International Arbitral Awards*, vol. X, p. 531.

[11] *Paquet* case (Belgian-Venezuelan Mixed Claims Commission, 1903), *United Nations Reports of International Arbitral Awards*, vol. IX, p. 325.

[12] *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, para. 43. See also *Vilvarajah and others v. United Kingdom*, Judgment (Merits), 30 October 1991, para. 102; *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, para. 73; *Ahmed v. Austria*, Judgment (Merits and Just Satisfaction), 17 December 1996, para. 38; *Boughamemi v. France*, Judgment (Merits), 24 April 1996, para. 41; *Bouchelkia v. France*, Judgment (Merits), 29 January 1997, para. 48; and *H. L. R. v. France*, Judgment (Merits), 29 April 1997, para. 33.

Indeed, it has always recognized the right of States,

> as a matter of well established international law, to control the entry, residence and expulsion of aliens.[13]

10. Considering the merits of the communication jointly submitted by four non-governmental organizations against Angola following the massive expulsions of nationals from various African States from that country in 1996, the African Commission on Human and Peoples' Rights referred to the right of expulsion as follows:

> The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide.[14]

11. Moreover, this universally recognized right[15] has been enshrined in the legislation of older countries.[16] One author noted at the beginning of the twentieth century that it had been incorporated into the legislation of most of the countries of Europe and the Americas and into many international treaties,[17] and there is no doubt, in the light of the current scale of migration, that this right is part of the legislation of all modern-day States.[18]

12. The right of expulsion exists, however, irrespective of any special provision in domestic or treaty law granting the right to the expelling State, as it derives from

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[13] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Judgment (Merits and Just Satisfaction), 28 May 1985, para. 67.

[14] African Commission on Human and Peoples' Rights, Communication No. 159/96, Union interafricaine des droits de l'homme, Federation Internationale des ligues des droits de l'homme, Rencontre africaine des droits de l'homme, Organisation nationale des droits de l'homme au Sénégal Association malienne des droits de l'homme v. Angola.

[15] See Martini, op. cit., p. 16.

[16] In the United Kingdom, for example, prior to the Aliens Act of 11 August 1905, see in particular Craies, *Jurisclasseur de droit international privé*, 1889), p. 357 ff; in France the right of expulsion was granted in 1849 to the Government, but it was not new: the law of 28 ventôse, year VI, had already included it in its article 7, which stated: "Any alien travelling within the Republic or residing there without having a mission of neutral or friendly Powers recognized by the Government, or without having acquired citizenship, shall be placed under the special surveillance of the *Directoire executive*, which may withdraw their passports and require them to leave French territory, if it deems their presence might disturb the public order and peace;" see also, for example, the law of 21 April 1832, which gave the French Government the same right concerning foreign refugees. See in this respect, inter alia, Arthur Desjardins, "L'expulsion des étrangers" in *Questions sociales et politiques*, 1893, p. 107.

[17] See Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique", *Recueil des cours* (Collected Courses of The Hague Academy of International Law), vol. 18 (1927-III), p. 480, and the many examples of legislation from the period and international treaties which he cites on pp. 480-481.

[18] It would be tiresome to recapitulate here the relevant provisions of the legislation of every country in this respect. For European countries, a summary may be found in the following works: Bruno Nascimbene, ed., *Expulsion and Detention of Aliens in the European Union Countries* (Milan, Giuffrè, 2001); and Elspeth Guild and Paul Minderhoud, eds., *Security of Residence and Expulsion: Protection of Aliens in Europe*, Kluwer Law International (The Hague, 2001). For the United States of America, see in particular Louis B. Sohn and Thomas Buergenthal, eds., *The Movement of Persons across Borders, Studies in Transnational Legal Policy* (Washington, D.C., American Society of International Law, 1992), vol. 23. For a more general perspective, see Guy S. Goodwin-Gill, *International Law and Movement of Persons between States* (Oxford, Clarendon Press, 1978).

international law itself.[19] The Institute of International Law has thus stated, as noted earlier (see para. 4), that the right is a "logical and necessary consequence" of State sovereignty, of which it is an attribute, or of the State's independence. Around the same period, A. H. Marsh noted as self-evident that "[t]he right to exclude, being a mere incident of the sovereignty of each State over its territory is of course fully recognized by *international* law".[20] In the conclusion of an early 1940s study on the practice of excluding and expelling aliens in Latin America, another author stated: "There is nothing in the law of nations which forbids the expulsion of the 'domiciled' or 'resident' alien".[21] Concerning, in particular, the practice in Latin America, he wrote: "Latin American countries, exercising inherent powers of sovereignty, will, if there is a law, and if not, as a measure of high policy, exclude or expel aliens for reasons connected with the defence of the State, the social tranquillity, individual security, or the public order."[22]

13. This concept of the right to expel is set forth in several international arbitral awards. Thus, the sole arbitrator in the *Ben Tillet* case, Arthur Desjardins, wrote in section A of his award entitled "On the Right of Expulsion as a Matter of Principle":

> Whereas one may not contest the State's authority to ban from its territory aliens when it considers their activities or presence would compromise its security; whereas it also understands in the fullness of its sovereignty the implication of the facts underlying this ban ... .[23]

In the award rendered in 1903 in the *Maal* case, Plumley, the arbitrator, expressed more explicitly the idea that the right to expel is an inherent right. Reviewing the issue in relation to the exercise of this right by the Venezuelan Government, he wrote:

> There is no question in the mind of the umpire that the Government of Venezuela in a proper and lawful manner may exclude, or if need be, expel persons dangerous to the welfare of the country, and may exercise large discretionary powers in this regard. Countries differ in their methods and means by which these matters are accomplished, but the right is inherent in all sovereign powers and is one of the attributes of sovereignty, since it exercises it rightfully only in a proper defence of the country from some danger anticipated or actual.[24]

Similarly, the arbitration in the *Boffolo* case stated:

> The right to expel foreigners is fully held by every State and is deduced from its very sovereignty.[25]

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[19] See de Boeck, op. cit., p. 479.

[20] A. H. Marsh, "Colonial Expulsion of Aliens: An Answer", *American Law Review*, vol. 33, 1899, p. 90 (author's emphasis).

[21] J. Irizarry y Puente, "Exclusion and Expulsion of Aliens in Latin America", *American Journal of International Law*, vol. 36, 1942, p. 270.

[22] Ibid.

[23] Award of 21 August 1896, reproduced in the *Revue générale de droit international public*, 1989, p. 48.

[24] *Maal* case (Netherlands-Venezuelan Mixed Claims Commission, 1 June 1903, in *Ralston's Venezuelan Arbitrations of 1903* (Washington, D.C. 1904), pp. 914-915; see also *United Nations Reports of International Arbitral Awards*, vol. X, p. 731.

[25] *Boffolo* case (Italian-Venezuelan Mixed Claims Commission, 1903), *United Nations Reports of International Arbitral Awards*, vol. X, p. 528.

14. The question as it was raised in the late nineteenth century was whether it was possible to substitute precise rules on expulsion for the arbitrary ones which prevailed in many States.[26] From the perspective of contemporary international law, it seems that the right to expel, although it is a sovereign right of the State, is not conceived as an absolute right which confers discretionary power on the expelling State.

2. A non-absolute right

(a) Factual background

15. The right of expulsion has sometimes been considered an absolute right. This view arose particularly in the nineteenth century at the time when the debate on the right of expulsion as a right of the State based on international law began. In its 1893 decision, the Supreme Court of the United States of America considered "[t]he right of a nation to expel or deport foreigners" "as absolute and unqualified as the right to prohibit and prevent their entrance into the country", "being an inherent and inalienable right".[27] This position reflected, consciously or unconsciously, the traditional theory that the power of expulsion, a logical and necessary consequence of sovereignty, is absolutely discretionary and is not subject to any limits or controls.[28] The intense debate about the power of the State to expel aliens arose precisely because this absolutist understanding of the right of expulsion was such that it placed those subject to expulsion at the mercy of Governments.

16. This debate is now in the past, since the traditional view has been completely abandoned. Moreover, international practice overtook the literature on this point, and it has now been clearly acknowledged for almost two centuries "that the freedom to expel is not absolute, that it is subject to limits [...]".[29] In fact, from the time of its first work on the expulsion of aliens, the Institute of International Law has stated that the exercise of the right of expulsion is subject to certain restrictions, including the principle that "expulsion must be carried out with full consideration, in accordance with the requirements of humanity and respect for acquired rights".[30] On this point, it shared the views of Féraud-Giraud who, in his paper on the subject, stated that, in exercising its right of expulsion, a State must always, as far as possible, try to reconcile its duty to maintain order in its territory and to safeguard its own internal and external security with the need "to respect the laws of humanity, the human rights of every individual and the principle of freedom of relations between nations".[31] In the same vein, the Institute's rapporteur on the subject, von Bar, while recognizing that the sovereign right of States was unquestionable in that regard, nonetheless expressed the view, "no matter how far this sovereign right extends, it may not extend to abolishing all the individual rights of aliens".[32]

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[26] See extract of minutes of the meetings of the Institute of International Law, held on 8-9 September 1892 and chaired by Albéric Rolin, Vice-President, *Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, Geneva session, p. 185.

[27] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), pp. 707, 711 and 713.

[28] See de Boeck, op. cit., p. 472.

[29] Ibid., p. 473.

[30] *Annuaire de l'Institut de droit international*, vol. X, 1888-1889, Lausanne session, p. 236.

[31] Ibid., vol. XI, 1889-1892, Hamburg session, p. 276.

[32] Ibid., p. 316.

17. The danger of affirming that the right of expulsion was absolute and discretionary was well understood, but the legal response was not well articulated. Although the area of human rights is not the only one affected, both the literature and case law suggest that the right of expulsion is limited only by considerations of humanity and is therefore limited to the rights of the individual and his or her property rights. It is true that, by invoking the human rights of every individual and the principle of freedom of relations between nations (see preceding paragraph), the Institute of International Law seemed, in 1891, to be hinting at something new — but what? The early literature is not precise. Admittedly, it sets aside the theory adopted in the Middle Ages according to which State sovereignty was absolute and ownership of the territory was attributed to the State. However, in place of that theory, it proposes the rather vague idea that "it does not follow that the rights of aliens are at the mercy of the State's whim".[33]

18. In order to determine the scope of the rule establishing the power or authority to expel, the following question should be asked: what limits should be imposed on the right of expulsion? The answer to this key question has two distinct components. The first is linked to the very nature of the international legal order, which requires that every rule or principle of international law be compatible with the underlying tenets of that legal order; these are constraints that are intrinsic to or inherent in the legal order itself. The second component relates to the principles which must be respected when the right of expulsion is exercised; they constitute a set of rules derived from, or essentially produced by, the legal order in the form of objective and general rules or in the form of rules created by the subjects of international law. This second category of limits will be dealt with separately under subheading B of this section.

(b) Limits inherent in the international legal order

19. Since international law applies to equal, sovereign entities "with the same claims to the exercise of absolute sovereignty", it constitutes a vital means of regulating the coexistence of these sovereign entities while also being the necessary corollary thereof.[34] In fact, in modern international law, State sovereignty cannot be understood in the absolute sense; it means only that no State is subordinate to any other State, but that each must respect the minimum rules that guarantee, on the one hand, the same privileges to all other States and, on the other hand, the very survival of the legal order. In this regard, State sovereignty is limited by a number of underlying tenets that are inherent in the legal order and without respect for which the very existence of international law would be compromised and the international community doomed to total anarchy.

20. The discretionary power of expulsion is limited by the general principles governing State actions in the international order. In fact, as a right inherent in State sovereignty, the right of expulsion is naturally subject to these limits, a set of underlying tenets that form the basis of the international legal system. These limits exist independently of other constraints relating to special areas of international law such as international human rights law, international refugee law and the law on migrant workers. They are inherent in the international legal order in the same way

[33] Darut, op. cit, p. 19.

[34] See, inter alia, Patrick Dailler, Nguyen Quoc Dinh and Alain Pellet, *Droit international public*, 7th ed. (Paris, Librairie générale de droit et de jurisprudence, 2002, p. 83.

as the right of expulsion is inherent in sovereignty. Since the sovereign right of expulsion is not, therefore, an absolute right, its validity is determined in the light of the State's obligations, whether they derive from custom, treaty, or general principles of law.[35] As has been noted, the term "discretionary", which qualifies the power of the State with regard to expulsion, is generally coupled with the idea that such a power is not "arbitrary" and, consequently, that the State should not abuse the discretion accorded to it in such matters. "The rules thus define both the powers of a State and the limits of its authority, and provide protection to an individual against the abuse of authority."[36]

21. The Special Rapporteur believes, however, that the limits inherent in the international legal order, in so far as they make that legal order possible, should be distinguished from the limits arising from specific areas of international law which form part of the conditions for the exercise of the right of expulsion.

22. The intrinsic principles that qualify the right of expulsion are *pacta sunt servanda*, good faith and the requirement of respect for jus cogens, which implies a principle of non-conflict between a given rule of international law and a peremptory norm. These are the principles on the basis of which the right of expulsion is said to be unquestionable, without, however, being an absolute rule; they are the reverse side of the rule. The principles are well known and do not require particular elaboration in the context of this report.

23. In the light of the points set out above, draft article 3 should read as follows:

Draft article 3
Right of expulsion

1. A State has the right to expel an alien from its territory.

2. However, expulsion must be carried out in compliance with the fundamental principles of international law. In particular, the State must act in good faith and in compliance with its international obligations.

B. A right to be exercised subject to respect for the fundamental rules of international law

24. The principles which are intrinsic to and inherent in the international legal order and which represent the other side of the coin of the right of expulsion must be distinguished from the principles governing the exercise of the right of expulsion. The latter principles are external to the international legal order and determine the relevant legal regime. The well-known distinction made by Herbert Hart between "primary rules" and "secondary rules" could usefully be applied in this instance. While the right of expulsion and its intrinsic limits constitute primary rules, the principles that form the basis for the exercise of that right constitute secondary

[35] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford, Clarendon Press, 1978), p. 21; see also B. O. Iluyomade, "The scope and content of a complaint of abuse of right in international law", *Harvard International Law Journal*, vol. 16, No. 1 (1975), pp. 82-83; and A/CN.4/565, paras. 198-200.

[36] Louis B. Sohn and Thomas Buergenthal, eds., op. cit., pp. IX-X; and A/CN.4/565, paras. 201-239.

rules; for that reason, they are part of the relevant codification work of the International Law Commission.

25. The rules of international law governing the right of a State to expel aliens include both the substantive rules and the procedural rules which must be observed if the expulsion is to be lawful. As one author has written:

> In all these respects the power of expulsion is typical of the competences possessed by States with respect to the entry and residence of aliens. Formerly characterised as aspects of the State's absolute discretion, these powers are regulated and controlled, both as to their substance and as to their form, by a system of rules now sufficiently advanced and cohesive to be described as the international law of migration.[37]

26. Some of these rules are of domestic origin but acquire the status of norms of international law, either as "general principles of law recognized by civilized nations", or as norms generated by State practice which are the subject of a court ruling.

27. The study of treaty practice and case law, both national and international, in particular that of regional human rights courts, reveals the following general principles, which are widely recognized as applicable to the expulsion of aliens: the principle of non-expulsion of nationals, the principle of non-expulsion of refugees, the principle of non-expulsion of stateless persons, the principle of prohibition of collective expulsion, the principle of non-discrimination, the principle of respect for the fundamental rights of the expelled person, the principle of prohibition of arbitrary expulsion, the duty to inform and the duty of the expelling State to respect its own law (*patere legem quam fecisti*) and the procedure prescribed by the law in force. Taking these three principles together, three distinct categories of limits emerge: limits relating to the person to be expelled (*ratione personae*), limits relating to the fundamental rights of the person to be expelled (*ratione materiae*) and limits relating to the procedure to be followed with regard to expulsion (*ratione prosequi*).

1. Limits relating to the person to be expelled

(a) Principle of non-expulsion of nationals

28. The term "national of a State" means a person who is connected with the State in question by a link of nationality. Such a person has a current right of nationality of that State: he or she has the nationality of the State in question, which is therefore his or her national State or State of nationality. In that sense, the term "national" is contrasted with the term "alien", which, as indicated in the Special Rapporteur's second report (A/CN.4/573, para. 194), means "a *ressortissant* of a State other than the territorial or expelling State" in the present context.

29. As indicated in his second report (A/CN.4/573, paras. 128-129), the Special Rapporteur continues to believe that it is prudent not to embark on a study of the question of nationality, not only because the conditions for access to nationality are strictly a matter for the legislation of each State, but also because nationality is a restrictive and inadequate criterion against which to define the concept "alien".

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[37] Richard Plender, *International Migration Law*, revised 2nd ed. (Dordrecht, Martinus Nijihoff, 1988), p. 477.

30. Nonetheless, determination of a person's nationality is a question of international law. This is particularly true when the laws of two or more States attribute different nationalities to the same person. In the *Arata* case, Uríbarri, who was the arbitrator pursuant to the Italian-Peruvian agreement of 25 November 1899, stated in this regard: "Doubtless, when the laws of two States each attribute a different nationality to the same person, the courts of each State apply the laws of that State; however, if the question is brought before an arbitral tribunal, that tribunal rules in accordance with the principles of international law."[38]

31. This is what the arbitral tribunal presided over by Louis Renault did in the *Canevaro* case. The case related to Count Raffaele Canevaro, who was a native of Peru but was of Italian descent; at the time of his birth he was Peruvian under Peruvian law *jure soli* and Italian under Italian law *jure sanguinis*. The arbitral tribunal constituted under the Italian-Peruvian agreement of 25 April 1910 was called upon to decide whether Canevaro was entitled to be considered an "Italian claimant". The tribunal, while stating its equal respect for the laws of the two States in question, sought evidence of Canevaro's affiliation with one of the two States. It expressed its preference for what the literature called "*active nationality, de facto and de jure* nationality, the nationality for which the person in question has expressed a clear and consistent preference".[39] The arbitral tribunal found that Raffaele Canevaro had in fact repeatedly acted as a Peruvian citizen by running for the Senate, to which only Peruvian citizens are admitted and before which he had presented himself to defend his choice of nationality, and in particular by accepting the position of Consul General for the Netherlands after requesting authorization from the Peruvian Government and, subsequently, Congress.

> Consequently, the Permanent Court of Arbitration in the Hague found that, in such circumstances, whatever the status of Raffaele Canevaro might be with regard to Italian nationality, the Government of Peru was entitled to consider him a Peruvian citizen and to deny him the status of Italian claimant.[40]

32. Based on arbitral case law and literature, this solution, as is well known, served as a model for the Permanent Court of International Justice,[41] and more specifically for the case law of the International Court of Justice, notably in the *Nottebohm* case.[42]

33. Therefore, it is not for international law to establish conditions of access to nationality — a matter which falls wholly within the competence of the State — but to settle problems relating to conflict of nationality on the basis of criteria specific to international law. These criteria make it possible to determine under international law whether a person has the nationality he or she claims to have, or, on the other

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[38] Verdict of 30 September 1901, in Baron Descamps and Louis Renault, *Recueil international des traités du XX^e siècle* (Paris, Rousseau), vol. I, p. 709.

[39] De Boeck, op. cit., p. 459 (author's emphasis) and "La sentence arbitrale dans l'affaire *Canevaro*, 3 mai 1912", *Revue générale de droit international public*, 1913, vol. XX, pp. 348-349.

[40] Ibid.

[41] See, in particular, Permanent Court of International Justice, *Nationality Decrees Issued in Tunis and Morocco*, advisory opinion of 7 February 1923, *I.C.J. Reports* 1923, series B, No. 4.

[42] *Nottebohm* (*Liechtenstein v. Guatemala*) case, Judgment of 6 April 1955, *I.C.J. Reports 1955*, p. 4.

hand, whether a State which claims that a person is not a national of that State is in fact that person's State of nationality.

(i) The principle

34. Since international law can thus determine a person's nationality in the event of a conflict, it establishes conditions for the application of the prohibition of expulsion by a State of its own nationals. The question is whether a rule exists in this regard in international law. The memorandum by the Secretariat provides a synthesis of the relevant elements of an answer to this question:

> Although international law does not appear to prohibit the expulsion of nationals in general, the ability of a State to take such action may be limited by international human rights law. First, some human rights treaties expressly prohibit the expulsion of a person from the territory of the State of which he or she is a national. Secondly, the right of a national to reside or remain in his or her own country may implicitly limit the expulsion of nationals. Thirdly, the duty of other States to receive individuals is limited to their own nationals. Thus, the expulsion of nationals can only be carried out with the consent of a receiving State. The limitation on the expulsion of nationals may extend to aliens who have acquired a status similar to nationals under the national law of the territorial State. Fourthly, the national law of a number of States prohibits the expulsion of nationals (footnotes omitted).[43]

35. With regard to international human rights instruments, it is worth mentioning in particular the American Convention on Human Rights, article 22, paragraph 5, which provides as follows:

> No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.

The Inter-American Commission on Human Rights found a violation of this provision in the case of the expulsion of a number of Haitians from the Dominican Republic: the persons in question, sugar-cane cutters, were rounded up and expelled in an indiscriminate manner, even though they included several individuals born in the Dominican Republic who therefore had the nationality of that country.[44]

36. With regard to the rights of nationals, it is worth noting that, in addition to the numerous examples of national laws that prohibit the expulsion of nationals cited in the memorandum by the Secretariat (A/CN.4/565, para. 36, footnote 60), French law, for example, has long affirmed the principle of the prohibition of the expulsion of French nationals from France. It has been accepted that an expulsion order issued by a prefect against a French national is not binding upon the latter. This principle, based on a person's having the status of French national, has been examined in many judgements and decisions: when a person claims to be a French national, the

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[43] A/CN.4/565, para. 36, and the comprehensive footnotes provided on the same pages, in particular the list of provisions of international human rights conventions expressly prohibiting the expulsion by a State of its own nationals: article 22, paragraph 5, of the American Convention on Human Rights of 22 November 1969 and article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights.

[44] See progress report of the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere (sect. II (a), para. 9), in *Annual Report of the Inter-American Commission on Human Rights 1999*, OEA/Ser.L/V/II.106 doc. 6 rev., 13 April 2000, chap. VI.

onus is on the Public Prosecutor's Office to prove that the person is an alien.[45] At the beginning of the twentieth century, Martini wrote:

> Needless to say, aliens who have become naturalized French citizens may not be expelled, and, conversely, French nationals who have lost their French nationality may be expelled from France.[46]

37. This opinion drew on a decision of the Court of Chambéry of 21 May 1908 in the *Solari* case amending a decision of the Saint-Julien Correctional Court of 30 January 1908. The case involved a French citizen who had deserted from the French army before the end of his seven-year voluntary tour of duty. He had left France to reside in Geneva, where he became a naturalized Swiss citizen on 8 February 1861. He then returned to France, where he claimed that he had never lost his French nationality as a result of his naturalization because, as at 8 February 1861, his second tour of duty —from which he had deserted — was still ongoing. He claimed that the French Government itself had come to the same conclusion, since, at the time of the amnesty of 14 August 1869, the French Consul General in Switzerland had expressly granted him the status of French national by authorizing him "to return home" and stating that he could not be prosecuted for desertion. The Court accepted that argument

> and said that, since Solari had retained French nationality, the expulsion order issued against him was invalid.[47]

Continuing his consideration of the question of persons who may be expelled, Martini wrote:

> Only French nationals may not in fact be expelled. They have a right to remain in France, of which right they may be deprived only by a sentence of banishment.[48]

38. Similarly, but on the basis of the reverse reasoning, one author noted at the beginning of the twentieth century that an individual born on French soil to unknown parents who returns to France and thereby infringes an expulsion order previously issued against him or her, may not be convicted in a criminal court if he or she claims to be a French national, unless evidence is produced that he or she is an alien.[49] The author concluded his analysis as follows:

> Consequently, if we accept the principle set out by the Institute of International Law, i.e. that the State has the right to expel only those who do not have a current right of nationality, we must conclude that an individual who, by law, has the capacity to acquire French nationality ceases to be treated as an alien as soon as he or she applies for that status in accordance with the

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[45] See Nice Civil Court, 6 January 1893, *Dalloz périodique*, 1893, 3, p. 245, and the note by Dupuis; Court of Cassation, 28 May, *Journal du droit international (Clunet)*, 1904, p. 689; Paris Civil Court, 30 June 1905, ibid., 1907, p. 730; see also Darut, op. cit., p. 207; Martini, op. cit., pp. 155-156; and de Boeck, op. cit., p. 590.

[46] Martini, op. cit., p. 26.

[47] Decision reproduced by Martini, op. cit., pp. 27-28.

[48] Ibid., p. 30; and, along the same lines, see in particular René Garraud, *Traité théorique et pratique du droit pénal français*, vol. 1, 2nd ed. (Paris, Larose et Forcel, 1898-1902), No. 178, p. 333; Larcher, note under Algiers, 3 December 1903, *Revue algérienne*, 1906, 2, p. 17.

[49] See Darut, op. cit., p. 75.

law, that is as soon as that person's right to apply for French nationality is no longer a potential right but has been exercised.[50]

39. Given the abundant national and international practice mentioned above and doctrinal opinion on the subject, which is long-standing and nearly unanimous, there is cause to be — at the very least — cautious about the statement that "a general rule of customary international law forbidding the expulsion of nationals does not exist".[51] In fact, the *principle* of the prohibition of expulsion by a State of its own nationals is indisputable in international law, even though, like most principles, there are certain exceptions to it, as we shall see below. Whether it takes the form of a customary rule or a general tenet of law, the principle exists in international law. This seems to have been the view of the Institute of International Law when it considered the "right to admit and expel aliens", as shown in particular by its work on the subject at its Geneva session in 1892. Article 2 of its International Rules on the Admission and Expulsion of Aliens, adopted at that session, provides as follows:

> In principle, a State may not prohibit either its nationals or persons who are no longer nationals of that State but have not acquired the nationality of any other State from entering or remaining in its territory.[52]

40. The expression "in principle" at the beginning of this article had been suggested by Desjardins in response to the concern expressed by Pradier-Fodéré, who found the wording proposed by von Bar, reproduced below, "a little ambitious":[53]

> International law is contrary to any act which prohibits nationals from entering or remaining in the territory of the State to which they belong. The same applies to persons who are no longer nationals of that State but have not acquired the nationality of any other State.[54]

41. The wording was somewhat abrupt. It was very difficult indeed to state categorically that international law was "contrary to" something. This same problem was apparent in the case of the right to expel. The formulation was valid for the prohibition of expulsion, including the expulsion of nationals. By that time, however, the laws of some States had extended the principle of non-expulsion by a State of its nationals to certain categories of individuals who were clearly designated as aliens or non-aliens. Thus, according to article 2 *in fine* of the Belgian law of 12 February 1897 — referring to article 9 of the Belgian Civil Code, which was conceived in the same terms as article 9 of the French Civil Code — the following persons could not be expelled:

1. An alien authorized to establish his domicile in the Kingdom;

2. An alien married to a Belgian woman with whom he has had one or more children born in Belgium during his residence in the country;

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[50] Ibid., p. 94.

[51] Karl Doehring, "Aliens, Expulsion and Deportation", in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, 1990, vol. I (Amsterdam, Elsevier Science Publishers, 1992), p. 110.

[52] *Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, Geneva session, p. 219.

[53] Ibid., p. 188.

[54] Ibid., p. 187.

3. An alien who is married to a Belgian woman and who has resided in Belgium for more than five years and continues to reside there permanently;

4. An individual, born in Belgium of foreign parentage, who has resided there for the time period stipulated in article 9 of the Civil Code.[55]

42. Likewise, the law of Luxembourg of 30 December 1893 provided that a child who has the option to choose his nationality "cannot be expelled before the expiry of the allowable time period".[56] The law of the Netherlands at that time also provided that "an alien who, having established residency in the country, has married a Netherlander and has had children born in the Kingdom, may not be expelled".[57] The Brazilian law of 7 January 1907 "on the expulsion of aliens from the national territory" declared that "an alien cannot be expelled if he has resided in the territory of the Republic for two continuous years, or even less time if he is also: (a) married to a Brazilian, or (b) widowed with a Brazilian child".[58] These provisions of article 3 of the law were expressly applied in two judgements, that of the Federal High Court of 30 January 1907 and that of the Federal Court of Appeals of 11 February 1907.[59] In Venezuela, under article 6 of the law of 16 April 1903, not only were "domiciled aliens" and "temporary aliens" not subject to expulsion, but they lost their status as aliens and were, ipso facto, "subject to the same responsibilities, duties and obligations as nationals in respect of potential political risks".[60] More recent examples include the current Italian law stipulating that the following categories of aliens cannot be expelled from the national territory, their status being assimilated to that of Italian nationals: minors, with few exceptions; pregnant women; persecuted persons; refugees and asylum-seekers; aliens living with relatives up to the fourth degree; and holders of residence permits.[61] It could be concluded from these laws that certain States do not permit the expulsion of aliens who have been granted citizenship status by law, such as aliens who, having been born in the country of foreign parents, have been legally naturalized.[62]

43. The principle of non-expulsion of nationals should thus be understood broadly as applying to "*ressortissants*" of a State as defined by the Special Rapporteur in his second report (A/CN.4/573), i.e., not only to persons who, like nationals, have the nationality of a State, but also to certain "aliens" who have a similar status to that of nationals under the laws of the receiving State or who have ties with that State. The Human Rights Committee expressed a similar view in the *Stewart v. Canada* case.[63] In his analysis of this case, Gaja writes:

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[55] See the text of this law in *Annuaire de législations étrangers*, vol. 27, 1898, p. 514.

[56] See the text of this law in Ruppert, *Code pénal et Code d'instruction criminelle suivis des lois spéciales et règlements particuliers en matière répressive en vigueur dans le Grand-Duché de Luxembourg* (Luxembourg, Buck, 1900), p. 467.

[57] See Jitta, "Le droit d'expulsion des étrangers dans la législation des Pays-Bas", *Journal du droit international privé*, 1902, p. 69.

[58] See the text of this law in *Journal du droit international privé*, 1907, pp. 1217 ff.; and in *Revue du droit international privé*, 1908, pp. 855 ff.

[59] Judgements reported in *Revue de droit international privé*, 1908, pp. 822 ff.

[60] See the text of this law in *Annuaire de législations étrangères*, 1903, pp. 739 ff.

[61] See Paolo Bonetti, "Italy", in Bruno Nascimbene, ed., op. cit., p. 339.

[62] Martini, op. cit., p. 49.

[63] See *Official Documents of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. II, annex VI.G, paras. 12.3-12.5.

> Article 12 (4) of the UN Covenant states that "[n]o one shall be arbitrarily deprived of the right to enter his own country". In *Stewart v. Canada* the Human Rights Committee held, with regard to a British national who was expelled from Canada, that "if article 12, paragraph 4, were to apply to the author, the State party would be precluded from deporting him". Reading Article 12 (4) in conjunction with Article 13, which refers to the expulsion of aliens "lawfully in the territory of a State party", the Committee maintained that "his own country" as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not "aliens" within the meaning of Article 13". This would depend on "special ties to or claims in relation to a given country". The Committee referred to "nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them". The Committee also mentioned "other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence". On the contrary, foreign immigrants were excluded with one possible exception, which did not apply to the case in hand: "were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants".[64]

44. The author considers the issue to be controversial, however; the difficulty is as follows:

> Article 12 (4) assumes that a person can consider as his or her own only one country, while the foreign immigrants to whom the Committee referred were likely to have retained their nationality of origin and thus could have used the rights to enter and not to be expelled with regard to two different States: their State of nationality and the State of residence.[65]

45. The cases listed in the Committee's decision are fairly specific, however, and do not imply that every migrant alien could successfully claim the benefit of the Committee's broad interpretation of the notion of "his or her own country".

46. In any case, it is also acknowledged, in the literature and in practice, that some categories of persons who are not strictly speaking nationals of a State are not aliens either, in the sense of draft article 1 as proposed in the second report, and can therefore avoid expulsion. In this connection, the authors of *Oppenheim's International Law* write: "It [a State] may assimilate certain aliens to its own nationals, so affecting its powers under its own laws to expel them ...".[66] Thus, in the *Italian South Tyrol Terrorism* case, the Austrian Supreme Court decided that Italian nationals born in the South Tyrol could not be expelled from Austria, being subject to an Austrian law which required that they be treated as nationals for administrative purposes.[67]

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[64] Gaja, op. cit., pp. 292-293.

[65] Ibid., p. 293.

[66] Robert Y. Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I — Peace (parts 2-4), 1996, p. 940.

[67] See Supreme Court, 8 October 1968, *International Law Reports*, vol. 71.

47. The current laws of a number of States enshrine this principle of non-expulsion by a State of its nationals. The same is true of the provisions of some international treaties, in particular the regional human rights conventions. Thus, article 22, paragraph 5, of the American Convention on Human Rights[68] provides unequivocally as follows: "No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it". In an expanded but equally explicit wording, article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights[69] stipulates that "[n]o one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national". The same prohibition may also be deduced, *a contrario*, from article 12, paragraph 4, of the International Covenant on Civil and Political Rights[70] and article 12, paragraph 2, of the African Charter on Human and Peoples' Rights.[71]

48. The right of a national to live in his or her own country is commonly considered an essential element of the relationship between a State and its nationals.[72] Moreover, given that an alien would presumably be expelled to his or her State of nationality, to what State would a national be expelled?[73] It is thus reasonable to assert that "[a] State is usually unable to expel its own nationals since no other State will be obliged to receive them".[74]

49. In this case, international law affirms or recognizes the principle, but it does not necessarily preclude the possibility of derogating from it.

(ii) Exceptions

50. As stipulated in article 3, paragraph 1, of the above-mentioned Protocol No. 4 to the European Convention on Human Rights, the rule of non-expulsion of nationals is categorical and does not seem to allow any exceptions. The account of the reasoning behind the Protocol[75] shows that the drafters of this text chose the wording deliberately because they thought it was possible, in the framework of the Council of Europe, to give the prohibition against the expulsion of a national by a State an absolute character which was difficult to impose in the framework of the United Nations.[76]

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[68] United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123.

[69] See the text of this Protocol in *Human Rights: A Compilation of International Instruments*, vol. II, *Regional Instruments*, United Nations, document ST/HR/1/Rev. 5, p. 97.

[70] United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171. Article 12, paragraph 4, of the International Covenant provides as follows: "No one shall be arbitrarily deprived of the right to enter his own country".

[71] United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

[72] See Doehring, op. cit., p. 110.

[73] According to Gaja (op. cit., p. 292): "The rationale of this prohibition and of the correlative obligation of the national State to admit its nationals is first to give individuals a fundamental right that allows them to avoid the risk of sharing the fate of the captain of the 'Flying Dutchman'. Moreover, the prohibition to expel nationals and the obligation to admit them give States other than the State of nationality the opportunity to proceed with an expulsion".

[74] See Jennings and Watts, op. cit., p. 940; see also Gaja (op. cit., p. 292), who writes: "It could well be said that expulsion of nationals is prohibited by international law".

[75] See document 1057 of 17 November 1959.

[76] See Danièle Lochak, "Commentaire de l'article 3 du Protocole n° 4" in Louis-Edmond Pettiti, Emmanuel Decaux, Pierre-Henri Imbert, eds., *La Convention européenne des droits de l'homme: Commentaire article par article*, 2nd ed. (Paris, Economica, 1999), p. 1054.

51. The absolute principle that seems to emerge from the letter of this provision does not, however, accurately reflect what the drafters had in mind. The explanatory report of the committee of experts that drafted the Protocol indicates that a person's right to enter the territory of the State of which he is a national cannot be interpreted as giving him an absolute right to remain in that territory; the report suggests the hypothetical example of an offender who, having been extradited by the State of which he is a national and then escaped from prison in the requesting State, could not claim an unconditional right to asylum in his own country.[77]

52. It is obvious, moreover, that the principle of non-expulsion of nationals by a State has seen some exceptions in the past, particularly in the late nineteenth and early twentieth century, mainly owing to specific political situations in certain States.

53. Thus, in France, under articles 2 and 3 of the law of 14 March 1872 (later abrogated by the law of 1 July 1901) establishing certain penalties against members of the International Working Men's Association, the authority to expel could be used against French nationals, who were sentenced for being members of the Association.[78] Similarly, the law of 22 June 1886, known as the "law of princes", banned from French territory the heads of former rulers of France and their direct descendants, and authorized the Government to ban other members of these families, pursuant to a decree handed down by a council of ministers. Although this law applied only to a specific and fairly small number of French nationals, it is nonetheless true that French citizens belonging to this category were expelled from France.[79] The French could also be expelled from "Christian protectorates".[80] They could likewise be expelled from the colonies until the edicts authorizing such action were lifted: the decrees of 7 and 15 November 1879 and 26 February 1880, among

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[77] Ibid. The violation of article 3, paragraph 1, of Protocol No. 4 was alleged in a number of failed petitions to the European Commission of Human Rights: see, in particular, the petition against the Federal Republic of Germany and Austria submitted by a German citizen who had been sentenced to four years' imprisonment in Austria and provisionally expelled to Germany in the context of a criminal proceeding, and who alleged that his forced return to Austria to serve his sentence was a violation of article 3, paragraph 1 (req. No. 6189/73, *DR* 46, p. 214); petition lodged by a Turkish national and his French wife against France, alleging that the expulsion of the husband after he had been permanently banned from French territory for violating the law on drugs had directly led to the expulsion of his French spouse from her own country (req. No. 11939/86, *Kilicarlsan v. France*, decision of 13 October 1987); petition from an individual being sought by the French police in a homicide case, who, having dual French and Israeli nationality, had taken refuge in Israel, where he considered that his extradition to France was a breach of article 3, paragraph 2 (req. No. 13287/87, *Nakache v. France*, decision of 15 October 1987).

[78] See Martini, op. cit., p. 38.

[79] Ibid., p. 40.

[80] Ibid., p. 40. Article 82 of the edict of June 1778 provides as follows: "In all cases concerning policy or the security of trade of our subjects ... our consuls may arrest and send back to France, on national vessels, any French national who, because of his misconduct or involvement in plots, could represent a danger to the public". This right of expulsion was confirmed by the law of 28 May 1836. Thus, French nationals could be expelled from Turkey, Egypt and Bulgaria because of the capitulations, from Chine and the Sultanate of Muscat under a law of 8 July 1852, and from Korea and Siam. They could also be expelled from Morocco under treaties signed between Morocco and the Western Powers; ibid., pp. 40-42).

others, took away the authority of the colonial governors that had been granted to them by earlier edicts.[81]

54. Historical examples of the expulsion of nationals, in general concerning fallen royal families and other cases of banishment, are very rarely replicated today.[82] Nonetheless, the wording of article 12, paragraph 2, of the African Charter on Human and Peoples' Rights, which seems to apply to both aliens and nationals, implies that in some cases the latter may be refused admission or return to their country (non-admission) and, by extension, be expelled from it if necessary. This article provides as follows: "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

55. It is admittedly possible that the drafters of this Charter intended these restrictions to apply only to aliens. The lack of information on the preparation of this text, with the exception of some fragments, makes it impossible to determine with any certainty the drafters' intentions. In any case, one can envision the possibility that a State may, in some circumstances and for reasons of high-level policy or national security, expel its nationals, even in addition to the fairly frequent cases where the behaviour of State authorities forces certain nationals to flee into exile or become political refugees. The negotiated expulsion to Nigeria of Charles Taylor, former warlord turned head of State of Liberia, who was accused of committing many atrocities in his country, is one illustration. Admittedly, Taylor's departure from Liberia was negotiated between Taylor himself, the receiving State and several Western Powers that had a special interest in the Liberian situation; this was therefore not a unilateral decision on the part of the Liberian authorities. Still, in the particular case of that country, any new Government would have readily taken the decision to expel Taylor, provided there was a country willing to receive him. Indeed, the only absolute prerequisite to the expulsion of a national is the existence of a receiving State. In other words, a State cannot expel its nationals without the express consent of a receiving State.[83]

56. Of course, the expelled person has the right to return to his own country. The expelling State has the obligation, in this regard, to welcome the person back at any time at the request of the State that agreed to accept him or her. The expelling State cannot violate this right of return without placing its national in the same situation as that of a stateless person.

57. In view of the foregoing considerations, the following draft article is proposed:

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[81] Ibid., p. 42.

[82] It was no doubt with these historical examples in mind that the drafters of article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights used the term "exiled" (instead of "expelled") in the first draft of this provision, which was worded as follows: "No one shall be exiled from the territory of the State of which he is a national. Everyone shall be free to enter the State of which he is a national". Basically, it does not matter which term is used; as the Special Rapporteur has already explained in his second report (A/CN.4/573), the word "expulsion" was broadly used to denote a set of measures or actions carried out with the aim or having the effect of compelling an individual to leave the territory of a State, irrespective of the legality of his or her status. The European Commission of Human Rights understood the term the same way in the *Becker v. Denmark* case (req. No. 7011/75, decision of 3 October 1975, *DR*, 4, p. 215).

[83] See document A/CN.4/565, para. 36, and the unequivocal passages of the works cited in footnote 58 of that document.

Draft article 4
Non-expulsion by a State of its nationals

1. A State may not expel its own nationals.

2. However, if, for exceptional reasons it must take such action, it may do so only with the consent of a receiving State.

3. A national expelled from his or her own country shall have the right to return to it at any time at the request of the receiving State.

(b) Principle of non-expulsion of refugees

58. First, from the legal standpoint, the notions of "refugee" and "asylum seeker" need to be more clearly differentiated. Following current usage, especially the language of administration, some national laws or even the Convention implementing the Schengen Agreement now include applicants for refugee status in the category of "asylum seekers".[84] For example, article 1 of the Convention implementing the Schengen Agreement defines application for asylum as any application submitted by an alien with a view to obtaining recognition as a refugee in accordance with the 1951 Geneva Convention relating to the Status of Refugees and as such obtaining the right of residence. Indeed, a seeker of refuge, by his application, is requesting nothing other than that the territorial State offer him protection by allowing him to stay in its territory, which is no different from territorial asylum.

59. The two ideas of refuge and territorial asylum are, however, different and dissociated in legal terms. Under the heading "Asylum", article 2 of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa makes this distinction apparent. It provides that States members of OAU "shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality". This provision means that: (a) not all refugees are destined to become asylees; and (b) asylee status is determined by the national legislation of each State, unlike that of refugees, which is governed by international law. In other words, refugee status depends on international law, whereas territorial asylum is based solely on domestic law.[85] Consequently, the rules applicable to expulsion of the two categories of persons should be analysed separately, especially since there does not seem to be a rule for non-expulsion of asylees in international law.

60. With regard to the non-expulsion of refugees, an attempt will be made to construct the principle, before considering the derogations authorized by international rules and practice.

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[84] See Catherine Teitgen-Colly, "Le droit d'asile: la fin des illusions", *L'Actualité juridique — Droit administratif*, 20 February 1994, p. 99.

[85] In France, for example, territorial asylum is based on the preamble to the 1946 Constitution and the laws dealing with immigration control and the requirements for admission, reception and residency of aliens in France, in particular the law of 24 August 1993; see *Journal officiel de la République française*, August 1993, p. 12196.

(i) The principle

61. As discussed in the second report on the expulsion of aliens (A/CN.4/573, paras. 57-71), the definition of a refugee given by the 1951 Geneva Convention relating to the Status of Refugees is restrictive and liable to exclude various categories of persons who are considered refugees under regional international law and in contemporary literature and practice. In view of the definition contained in the 1951 Convention, which has been called Eurocentric in origin,[86] — in that its purpose was to protect political refugees who feared persecution in their countries of origin — and fundamentally "individualistic" because, under its authority, refugee status was granted only to individual persons, several authors have proposed even broader definitions of the concept of refugee.[87] Regional agreements have made it possible to fill the gaps in the 1951 Convention and the 1966 Protocol thereto and to deal with the massive flows of refugees produced in the 1960s and 1970s, in particular in Africa and Central America.

62. Whether or not to grant refugee status to members of the refugee's family depends on individual States: some laws are generous[88] while others are more restrictive.[89] In any case, once a person has been granted refugee status, his family

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[86] Oriol Casanovas, "La protection internationale des réfugiés et des personnes déplacées dans les conflits armés", *Recueil des cours de l'Académie de droit international*, vol. 306 (2003), p. 35.

[87] Some have argued that the definition should include persons who have carried out acts of resistance against oppressive regimes that deny the enjoyment of basic freedoms (see A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. I (Leiden, A. X. Sijithoff, 1966), pp. 220-225); or, more broadly, that the definition should cover persons who are fleeing countries where generally recognized human rights are being systematically violated (see T. Alexander Aleinikoff, "The meaning of 'persecution' in United States asylum law", *International Journal of Refugee Law*, vol. 3 (1991), pp. 12-13; J.C. Hathway, *The Law of Refugee Status* (Toronto, Butterworth, 1991), pp. 106-112). A much more inclusive interpretation has been that, in cases where many refugees are fleeing from situations of internal conflict and civil disorder, proof of persecution should not be required, and that a *presumption* of persecution should suffice for the 1951 Convention to be applicable to the candidate for refugee status (see D. J. Steinbock, "The refugee definition as law: Issues of interpretation", in *Refugee Rights and Realities: Evolving International Concepts and Regime*, F. Nicholson and P. Twomey, eds. (Cambridge, Cambridge University Press, 1998), pp. 34-35).

[88] In Cameroon, for example, article 5 of Act No. 2005/006 of 27 July 2005 on the status of refugees provides as follows:

"(1) The family members of a person considered as a refugee within the meaning of articles 2, 3 and 4 above who accompany or rejoin him are also considered as refugees, unless their nationality is other than that of the refugee and they enjoy the protection of their country of origin.

(2) If, after the head of family has been granted the status of refugee, family cohesion breaks down as a result of divorce, separation or death, the family members who have been granted refugee status under paragraph 1 above shall continue to enjoy such status, subject to the provisions of article 4.

(3) For the purposes of paragraphs (1) and (2) above, the family members of a person having refugee status shall consist of the refugee's spouse or spouses, minor children and other dependent family members

(4) Any decision taken pursuant to articles 3 and 4 of this Act shall not automatically affect the other family members as defined in paragraph (3) above".

The last paragraph of the article means, among other things, that the loss of refugee status or expulsion of the head of family does not automatically entail the loss of refugee status or the expulsion of the refugee's family.

[89] Thus, in France, whereas the law of 2 August 1989 extended the benefit of the residence permit to members of the refugee's family (his spouse and minor children), the law of 24 August 1993

members receive legal protection in the form of provisions stipulating that they may be expelled only for specific and limited reasons.

63. The principle of the non-expulsion of refugees is, however, worded in a negative way, which limits its scope by preventing it from being an absolute prohibition. Thus, article 32, paragraph 1, of the 1951 Geneva Convention relating to the Status of Refugees provides as follows:

> The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

64. This provision demonstrates that the principle of non-expulsion of refugees may be established, but only by deduction. Indeed, in the structure of this provision, the word "save" introduces an extreme limit to the rule that the refugee cannot be expelled. In other words, refugees cannot, in principle, be subject to expulsion measures; they cannot be expelled except — if absolutely necessary, so to speak — for two, non-cumulative reasons, namely, national security or public order.

65. The 1969 OAU Convention, for its part, introduces the idea of "voluntary repatriation", which does not appear in the 1951 Convention and the 1967 Protocol thereto. Strictly on the basis of the idea as embodied in article V of the OAU Convention, it might be concluded that there is an absolute principle of non-expulsion of refugees — in the broad sense in which the concept of expulsion was defined in the second report. Article V, paragraph 1, of that Convention reads as follows:

> The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.

However, not only should the 1969 OAU Convention — like the 1984 Cartagena Declaration on Refugees for Central America — be seen as complementary to the 1951 Geneva Convention, but "expulsion" and "repatriation" should be viewed as different concepts, subject to different procedures set in motion by causes that are not identical.

66. Article 33 of the 1951 Convention also seems to set forth a principle of non-expulsion, but it is immediately attenuated by the fact that, on the one hand, it refers to a special case where there would be risks of violating certain fundamental rights of refugees and that, on the other, expulsion may be permitted for certain specific reasons. Under the somewhat misleading heading of "Prohibition of expulsion or return", the above-mentioned article provides as follows:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a

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on immigration control and conditions of admission, reception and residency of aliens in France and subsequent amendments thereto have marked a setback in that regard, in that they require the members of the refugee's family to meet the same conditions for a regular residence permit as do other aliens (art. 15, para. 1, of the law of 24 August 1993).

final judgement of a particularly serious crime, constitutes a danger to the community of that country.

67. A comparison between article 32 and article 33, in particular with regard to their titles, implies, prima facie, that article 32 sets forth a permissive rule, whereas article 33 stipulates a prohibitive norm. In fact, this is not the case. Each provision contains both a prohibition and an authorization. Paragraph 2 of article 33 expands the range of reasons for the expulsion of refugees as set out in article 32, paragraph 1. Thus, whereas the latter provides only for grounds of "national security or public order", article 33, paragraph 2, instead uses the wording "... danger to the security of the country", and adds "a final judgement of a particularly serious crime, constitut[ing] a danger to the community of that country". This last-mentioned reason is especially vague, in that it fails to specify the nature and seriousness of the "danger" in question. Moreover, how does such a reason differ from "grounds of public order"? At any rate, it strengthens the expelling State's discretionary power in the case of the expulsion of a refugee, and thereby demolishes the strict limits established in article 32, paragraph 1. Unlike paragraph 2 of article 33, paragraph 1 reinforces the principle of non-expulsion by stating the circumstances that would produce the "prohibition" — although not absolute, because of the stipulations contained in paragraph 2 — of the expulsion or return of the refugee.

68. The Special Rapporteur holds the view that the principle is therefore not a matter of expulsion, but of non-expulsion, since expulsion is merely an exception which is, moreover, only permitted on certain very limited grounds.

69. One tendency today is to consider that a State which receives refugees — not refugees in the strict sense, but persons who are forced to flee their country because they are victims of armed conflicts or of events that have disturbed the public order, in whole or in part, of their country of origin, nationality or habitual residence[90] — should admit them to its territory and scrupulously observe the fundamental principle of non-refoulement, including non-rejection at the frontier.[91] Underlying this idea is a presumption that any member of a group of persons who have fled their country for the reasons indicated above is considered, prima facie, as a refugee, barring any evidence to the contrary. Along these same lines, one author has recently written that States have a "customary obligation" of non-refoulement of persons fleeing armed conflicts or generalized violence.[92] This goes well beyond the relevant treaty obligations. If such an obligation exists, it carries the correlate obligation not to expel the type of "refugees" in question, namely, those who have not yet been granted refugee status and who might therefore find themselves in the receiving territory illegally — at least before their situation has been considered by the competent national authorities.

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[90] See the declaration adopted in Sevilla in February 1994 during a workshop on "Refugees: law and solidarity", cited by Casanovas, op. cit., p. 82.

[91] Office of the United Nations High Commissioner for Refugees, Executive Committee Conclusions, No. 22 (XXXII), 1981, "Protection of Asylum-Seekers in Situations of Large-Scale Influx", para. II A (1); and No. 19 (XXXI), 1980, "Temporary Refuge", para. (b) 1. *Contra*, K. Hailbronner, "Non-refoulement and 'humanitarian' refugees: customary international law or wishful legal thinking", *Virginia Journal of International Law*, vol. 26 (1985-1986), p. 857.

[92] Anne V. Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague, Martinus Nijhoff, 2002), p. 165.

70. This doctrinal trend derives from article 31 of the Convention relating to the Status of Refugees, entitled "Refugees unlawfully in the country of refuge", which provides as follows:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

71. This principle also finds significant support in the recent work of the Global Commission on International Migration, which was launched in December 2003 on the initiative of the Secretary-General of the United Nations, acting at the request of the General Assembly. The Assembly, in its resolution 58/208 of 23 December 2003, had decided to devote a high-level dialogue to international migration and development during its sixty-first session in 2006 (see A/60/205). The Global Commission declares that, in their efforts to stem irregular migration, States must respect their existing obligations under international law towards the human rights of migrants, the institution of asylum and the principles of refugee protection.[93] In that regard, the Commission bases itself on the principle set forth in the Agenda for Protection established by the Office of the United Nations High Commissioner for Refugees (UNHCR), pursuant to which the institution of asylum should not be undermined by the efforts of States to stem clandestine or illegal immigration. The Commission urges all States to establish fast, fair and efficient refugee status determination procedures, so that asylum-seekers are quickly informed of the outcome of their case. In particular, it recommends that:

> In situations of mass influx, States should consider offering the new arrivals prima facie refugee status, a practice used to good effect for many years in Africa and developing countries in other regions.[94]

72. Non-expulsion of the persons concerned while their status is being determined is similar to "temporary protection", which in turn differs from "subsidiary protection". The Lauterpacht and Bethlehem report, prepared for the Global Consultations on International Protection sponsored by UNHCR, considers that "[t]emporary protection, which is a specific provisional protection response to situations of mass influx providing immediate emergency protection from refoulement, should be clearly distinguished from forms of complementary protection which are offered after a status determination and which provide a definitive status".[95] Such protection is granted to persons belonging to a specific group, on the basis of a political decision. On the other hand, "subsidiary protection", which is found in the legislation of European Union countries, among others, is a legally established status granted in individual cases.[96]

73. Some national laws apply temporary protection to applicants for refugee status. The French practice is quite interesting in that regard. Thus, unlike the 1951 Geneva

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[93] See *Migration in an interconnected world: New directions for action*, Report of the Global Commission on International Migration, October 2005, chap. III, p. 40. The report is available at the following address: <www.gcim.org>.

[94] Ibid.

[95] Elihu Lauterpacht and Daniel Bethlehem, "Complementary forms of protection", *Global Consultations on International Protection*, OHCHR document EC/GC/01/18 of 4 September 2001, para. 11 (g).

[96] See Casanovas, op. cit., p. 127. See also Vincent Chetail, "Le droit des réfugiés à l'épreuve des droits de l'homme: le bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitements inhumains et dégradants", *Revue belge de droit international*, 2004, No. 1, pp. 155-210.

Convention, which simply prohibits the contracting parties from returning or expelling a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened", the fourth preambular paragraph of the French Constitution of 27 October 1946, to which the current Constitution of 4 October 1958 refers, implies, according to the French Constitutional Council, "in general that an alien who claims this right should be permitted to remain temporarily in the territory until a decision has been taken on his claim".[97] This solution is directly based on the one accepted by the Assembly of the French Council of State, which, in two cases, has recognized that an asylum-seeker claiming refugee status should be allowed to remain provisionally in French territory until the French Office for the Protection of Refugees and Stateless Persons or, where applicable, the Refugee Appeals Commission, has ruled on his or her application.[98]

74. The basis of this "principle" — to use the term proposed by one author[99] — as applied by the Council of State is different from that used by the Constitutional Council: for the latter, the basis is the preamble to the Constitution, whereas for the former it consists of both article 31, paragraph 2, of the 1951 Geneva Convention and the law of 25 July 1952 establishing the French Office for the Protection of Refugees and Stateless Persons. In any case, its acceptance in case law has been accompanied by restrictions. In its decrees, the Council of State accepts that in cases where the sole purpose of such a claim is to thwart a deportation order against an alien who is already present in the country in an irregular situation, the administration is exempted from issuing the documents authorizing asylum-seekers to remain in France pending the decision of the Office for the Protection of Refugees and Stateless Persons or, on appeal, the judgement of the Refugee Appeals Commission.[100]

(ii) Derogations

75. A refugee cannot be expelled from the territory of the receiving State except for reasons of security and public order. As noted above, these derogations, which are internationally enshrined in article 31 of the 1951 Convention relating to the Status of Refugees, have long been recognized and practised in domestic law. There is consequently no need to dwell upon whether or not they exist. Nonetheless, it is worth analysing the exact content and meaning of the notions of endangerment of security and threat to or endangerment of public order. This is not an easy issue to deal with, since the determination of how to characterize a given situation may vary, depending on the State, epoch and context. There is no doubt that the authority to evaluate such endangerment or threats rests with each State, and that both international and national laws recognize this fact.

76. Terrorism, a phenomenon which has seen an unprecedented spread in recent times and become a source of concern to States, could be included in the notions of security and public order, in particular that of security. But its blind and indiscriminate violence and devastating effects single it out for special treatment.

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[97] Constitutional Council, decision No. 93-325 DC of 13 August 1993, *Journal officiel*, 18 August 1993, pp. 11722 ff.

[98] See Council of State, Assembly, 13 December 1991, *M. Nkodia et préfet de l'Hérault c. Dakoury*, in *Revue française de droit administratif*, January-February 1992, pp. 90-103.

[99] See Véronique Fabre-Alibert, "Réflexions sur le nouveau régime juridique des étrangers en France", *Revue de droit public et de la science politique en France et à l'étranger*, 1994, No. 2, p. 1184.

[100] Ibid.

This has been the approach taken by the international community in dealing with acts of terrorism, which are not considered ordinary crimes.

77. Security Council resolution 1373 (2001) can be taken to imply that a refugee may be expelled for the commission of terrorist acts or acts relating to terrorism. In paragraph 2 (d) of this resolution, the Security Council "[d]ecides" that all States shall:

> Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.

In paragraphs 3 (f) and (g), the Council "calls upon" States to:

> (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
>
> (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

78. In the light of these provisions, an actual refugee alien, that is, a person who, fearing for his life, has fled his State of origin but has not yet legally acquired refugee status, could be expelled on grounds of being involved in terrorist activities or facilitating the commission of terrorist acts. The resulting obligation to refuse refuge or asylum implies the right of expulsion if the receiving State is faced with the situations described in the relevant paragraphs of resolution 1373 (2001).

79. At the level of State legislative practice, section 22 of the Tanzanian Prevention of Terrorism Act 2002 offers an example of legislation designed to prevent a country's territory from being used as a safe haven from which attacks can be launched against other States;[101] it may, where appropriate, serve as a legal basis for the expulsion of aliens, including refugees.

80. The special case of terrorism and its recognition as one of the criteria for derogation from the principle of non-expulsion of refugees has more to do with the progressive development, rather than the codification, of a well-established customary rule. Nonetheless, the adoption of such a criterion would not be without its support, in respect of both the comprehensive body of international law and in State legislative practice. The fact that such a criterion may be based on a Security Council resolution is also relevant, given the principle of legality which underlies the Council's decisions.

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[101] Section 22 of this Act punishes recruitment for or association with a terrorist group and training in the United Republic of Tanzania for acts prohibited by paragraph (a) of the Section. The prohibition in paragraph (a) applies to acts in that country intended to promote or facilitate violent acts in a foreign State and whether or not their objective is achieved; see Office on Drugs and Crime, *Preventing terrorist acts: A criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments*, Technical assistance working paper, United Nations, New York, 2006, p. 26.

81. On the basis of the foregoing, the following draft article is proposed:

Draft article 5
Non-expulsion of refugees

1. A State may not expel a refugee lawfully in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.

2. The provisions of paragraph 1 of this article shall also apply to any person who, being in an unlawful situation in the territory of the receiving State, has applied for refugee status, unless the sole manifest purpose of such application is to thwart an expulsion order likely to be handed down against him or her [against such person].

(c) Principle of non-expulsion of stateless persons

82. Although the stateless person and the refugee differ in legal status, the two situations often have the same cause, namely, that the person concerned is fleeing from armed conflict or persecution on racial or political grounds. In its resolution adopted at its 1936 session in Brussels on the legal status of stateless persons and refugees, the Institute of International Law affirmed that the term "stateless person refers to any person who is not considered by any State to hold its nationality".[102] Nationality was thus, following the thinking of the nineteenth century — the "century of nationalities" — the essential element and benchmark for determining whether or not a person was considered a stateless person. In a more modern and open approach, in line with that proposed by the Special Rapporteur in his second report (A/CN.4/573), the Convention relating to the Status of Stateless Persons, concluded in New York on 28 September 1954, replaced the nationality criterion with the term "a national", which, as we have seen, is much more comprehensive. Article 1, paragraph 1, of that Convention specifically states:

> For the purpose of this Convention, the term "stateless person" means a person who is not considered *as a national* by any State *under the operation of its law*.[103]

83. The principle of non-expulsion of stateless persons was already an underpinning of one of the articles of the International Rules on the Admission and Expulsion of Aliens, adopted by the Institute of International Law on 12 September 1892, which reads as follows:

> In principle, a State shall not prohibit access into or a stay in its territory either to its subjects or to those who, having lost their nationality in that State, have acquired no other nationality.[104]

84. The explicit wording and codification of the rule came much later. Referring back to the framework of the 1951 Geneva Convention relating to the Status of Refugees, the 1954 New York Convention confirms the similarity between the status

[102] *Annuaire de l'Institut de droit international*, vol. XXXIX, t. II, 1936, Brussels session, p. 294.
[103] United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117; emphasis added.
[104] *Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, Geneva session, p. 219.

of stateless persons and that of refugees. With regard to expulsion, in particular, the two conventions set forth the same rules governing the subject in both cases. Using the same wording, mutatis mutandis, as the three paragraphs of article 32 of the 1951 Convention, article 31 of the 1954 Convention provides as follows:

> 1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons especially designated by the competent authority.
>
> 3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

85. The comments made with regard to article 32, paragraph 1, of the 1951 Convention (para. 64 above) also apply to article 31, paragraph 1, cited above.[105]

86. It should be noted that, as with refugees, only documented stateless persons are covered. Of course, the issue of stateless persons residing unlawfully in the territory of the host country is sensitive, as some undocumented migrants may fraudulently claim that they are stateless. What is to become, however, of the genuinely stateless persons who nevertheless reside unlawfully in the territory of a State? Could the State expel them? To which country could they be sent? To their last country of residence? Under what conditions? Those provided for in article 31, paragraph 3, for stateless persons residing unlawfully in the territory of the State? These questions could call into doubt the relevance of the distinction between documented stateless persons and undocumented stateless persons in the light of article 31, paragraph 1. Furthermore, aside from persons who become stateless while they are already in the territory of the host State, most others can enter such a State only by unlawful means, as they do not generally possess the official State documents required for admission into another country.

87. Paragraph 2 of article 31 cited above deals with the conditions and procedures for expulsion; we shall refer back to it when we take up this issue.

88. Concerning paragraph 3, the first sentence raises some questions. Specifically, how can stateless persons in the process of being expelled seek admission into a new host country? Must their efforts be limited to countries with diplomatic missions in the expelling State? Will not their chances of succeeding in their efforts be limited if this host State has only a few foreign diplomatic missions? Moreover, even assuming that the expelling State is particularly generous in its interpretation of the notion of "reasonable period" and grants the stateless person a sufficient

[105] Pursuant to article 9 of the 1954 Convention, a particular person may be expelled as a provisional measure in time of war or other grave and exceptional circumstances pending a determination by the Contracting State that that person is in fact a stateless person and that the continuance of such measures is necessary in his case in the interests of national security.

length of time, what will happen during this period if the efforts of the stateless person led nowhere? May the State expel the person nevertheless? If so, to which country?

89. These questions, particularly the last one, do not merely reflect theoretical concerns. The *John K. Modise v. Botswana* case before the African Commission on Human and Peoples' Rights[106] shows that these questions may be raised in practice. The complainant argued that he was unjustly deprived of his Botswana citizenship. He claimed the right to citizenship under the following circumstances: his father, Samuel Remaphoi Modise, a citizen of Botswana as a former "British subject" of Bechuanaland (present-day Botswana), immigrated to South Africa for work. During his stay, he married Elisabeth Ikameng Modise, and John Modise was born of this marriage. His mother died when he was three months old and his father took him to the Bechuanaland Protectorate to ensure that he would be cared for by his relatives. The complainant consequently grew up in the Protectorate and lawfully returned there after trips abroad.

90. In 1987, John Modise was one of the founders and officials of an opposition party called the Botswana National Front. He believes that it is because of his political activities that he was declared an "undesirable immigrant" by the Government of Botswana. On 17 October 1998, he was arrested and deported to South Africa, where he was handed over to the police without being brought before a tribunal. Having returned to Botswana, he was once again arrested and deported without trial to the same country. After his third attempt at returning, he was charged, convicted of illegal entry and declared an undesirable immigrant. He was serving a 10-month prison term and had filed an appeal when he was deported for the fourth time to South Africa, before the case was concluded. The Commission noted that "since the Complainant did not have South African nationality, he was obliged to settle in the 'homeland' of Bophutatswana". He lived there for seven years until the government of this "bantustan" issued a deportation order against him and he found himself in the no-man's land between Bophutatswana and Botswana, where he remained for five weeks before being admitted into Botswana on a humanitarian basis. He obtained a three-month entry permit, renewable at the entire discretion of the competent Ministry, until June 1995.[107]

91. Here is not the place to enter into a discussion on the main point of contention raised by the respondent State, namely, whether John Modise could not or had not become a citizen of Botswana by descent in accordance with the former Constitution of that country, given that he was neither a British subject nor a citizen of the United Kingdom and its colonies when Botswana attained independence in 1966. The African Commission on Human and Peoples' Rights resolved the question: John Modise is indeed a citizen of Botswana by descent, as he is the son of his father, himself a citizen of Botswana, and the Government of Botswana must take appropriate measures to recognize this nationality and compensate him adequately for all the damages which he has sustained as a result of the violation of his rights.

92. The main interest of this case with respect to the issue of the expulsion of stateless persons is that Botswana had continued to deport John Modise even though

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[106] See Communication No. 97/93, *John K. Modise v. Botswana*, presented at the twenty-eighth ordinary session of the Commission in November 2000 in Cotonou, Benin, decision of 6 November 2000.

[107] Ibid.

it was found that he had the nationality of neither South Africa nor Bophutatswana and, moreover, not having the nationality of Botswana, which the authorities of this country had denied him, he found himself in a situation of statelessness. It should be noted that in this case none of the grounds for expulsion of a stateless person provided for under article 31 of the 1954 Convention — either national security or public order — had been invoked by the expelling State; a host country was not found by the expelled person and the expelling State had never made a request for him to do so. In short, Botswana did not act within the context of expelling a stateless person, although such a context clearly applied.

93. It seems that the rules for the expulsion of stateless persons too easily reproduced the wording of the rules for the expulsion of refugees, given that — it bears repeating — asylum and statelessness are entirely different situations. Refugees possess a known nationality. They are generally in a situation of distress caused by an irresistible force for which they are not generally responsible. For this reason, their situation as victims elicits some compassion or simple understanding which could pave the way for entry into a host State. The same does not go for stateless persons. Deprived of their nationality, stateless persons cannot travel abroad unless the host State considers them as having the rights and obligations related to the possession of nationality of that State and consequently issues them a passport. Otherwise, any host State party to the Convention relating to the Status of Stateless Persons of 28 September 1954 is required only to accord to stateless persons "the same treatment as is accorded to aliens generally".[108] We can well imagine how a person without any nationality, who in principle enjoys only the rights granted to foreigners in the country of residence, might have serious difficulties in finding a host State; furthermore, if the person is expelled, it is either because he or she has committed offences against the national security of the expelling State or constituted a threat to national security or because he or she is said to have committed an offence against the public order or constituted a serious threat to it.

94. Unless a person has relations with a foreign power which would be willing in principle to host him or her, it would not be practical for such a person "to lawfully obtain admission into another State". According to the Special Rapporteur, the intervention of the expelling State in the search for a host State for the expelled stateless person may be deemed necessary. Such an intervention could be envisaged if the steps taken by the stateless person to obtain legal admission into another host State prove unsuccessful. The protection of the rights of expelled persons requires, however, that they consent to the country to which they would thus be deported.

95. Nevertheless, given that the practice of States with respect to the expulsion of stateless persons is woefully inadequate, such an idea can only be drawn from an analysis of the provisions of the aforementioned paragraph 3 of article 31 (see para. 84). At best, the idea may be put forward as part of the progressive development of international law.

96. The following draft article is being proposed in the light of the foregoing considerations. It includes in the first paragraph the core of article 31, paragraph 1, of the 1954 Convention, with some stylistic changes, and in paragraph 2 a new

[108] See article 7 of the Convention.

version of the first sentence of paragraph 3, enhanced by the above-mentioned suggestions:

Draft article 6
Non-expulsion of stateless persons

1. A State may not expel a stateless person [lawfully] in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State.

2. A State which expels a stateless person under the conditions set forth in these draft articles shall allow such person a reasonable period within which to seek legal admission into another country. [However, if after this period it appears that the stateless person has not been able to obtain admission into a host country, the State may [, in agreement with the person,] expel the person to any State which agrees to host him or her].

(d) Principle of prohibition of collective expulsion

97. The practice of collective expulsion is not a recent phenomenon. In the past, it was often closely related to situations of armed conflict or serious crises between two States; nevertheless, collective expulsions have been carried out in time of peace as well as in time of war.

(i) In time of peace

98. Indeed, apart from cases of war, collective expulsion was carried out by the United States Government in the nineteenth century.[109] Having granted subjects of the Celestial Empire, in an 1863 treaty, treatment equal to that enjoyed by United States citizens, the United States Government, faced with the steadily increasing influx of what was derogatorily called the "yellow immigration" or "yellow peril", ceased to fulfil the terms of the treaty and then negotiated with China a new treaty, the Treaty of 17 November 1880, granting it the right to suspend or limit the immigration of labourers "whenever it deems it necessary for the protection of its interests". Two years later a United States law suspended immigration for a period of 10 years. But before the expiry of this period, United States Government obtained, on 12 March 1888, the signature of the "Chinese Minister to Washington" to a treaty prohibiting the entry into United States territory of "any labourers of the yellow race" for 20 years. The Chinese Government refused to ratify a treaty which it deemed not only unfavourable to the interests of its nationals but also vexatious and overly restrictive in its provisions. In the light of this refusal, the United States of America enacted a law on 1 October 1888, which prohibited de facto immigration of Chinese workers into United States territory, and later a second law called the Chinese Exclusion Act, which imposed very strict conditions of stay on Chinese labourers,[110] thus leading to a collective expulsion by virtue of the State's conduct.

[109] Darut, op. cit., p. 46.
[110] Ibid., pp. 47-48.

99. In Europe, there were cases of collective expulsion dating back to the seventeenth century. Thus, in Spain, in strict violation of the prevailing principles of international law, a 1703 law, which long remained in force, ordered the mass expulsion of all British and Dutch subjects who were not Catholic; in Russia, a 1793 law enacted by Emperor Paul I ordered French nationals residing in Russia, under penalty of expulsion, to renounce the atheistic and seditious doctrines of their countries of origin.[111]

100. Later, in the twentieth century, following numerous, serious and persistent difficulties between Germany and Poland subsequent to the demarcation of borders between these two countries in accordance with the Treaty of Versailles, Germany expelled "en masse", as was said at the time, Polish workers residing in its territory: it had expelled 25,000 such workers by late 1922. As a means of retaliation, the Polish Government expelled in turn a number of German nationals in April 1923 and undertook new retaliatory measures in January 1924 by expelling 14 German families, as the Government of Bavaria had expelled 14 Jewish families of Polish nationality. In addition, as other mass expulsions of Polish citizens had taken place in Mecklenburg-Schwerin in Germany, despite protests from the Polish Minister in Berlin, Poland took the retaliatory measure of expelling 150 Germans residing in the Poznan and Pomerania districts.[112]

101. Other than by the political protests of Governments whose nationals have been victims of these mass expulsions, such expulsions have not been contested on the basis of international law. The literature of the period saw nothing but the exercise by the expelling States of the "right to expel aliens" recognized by international law.[113] This emerges clearly from the opinion of some authors of the period. Thus, following the annexations and de-annexations enshrined in the peace treaties which ended the First World War and which occasioned the frequent exercise of the right of expulsion, France was faced with the question, as a result of the reintegration of Alsace and the part of Lorraine annexed to Germany by the Treaty of Frankfurt, of whether it should limit the change of nationality to former French nationals. About 500,000 Germans representing 28 per cent of the population lived in these recuperated *départements*. There was a vague notion that to keep them would have represented "a danger to France". The question was whether to expel them en masse or absorb them. Two prominent French authors of the period, Pillet and Niboyet, responded:

> Mass expulsion would have been by far the better alternative, if we could have ensured that Alsace and Lorraine would have the same population. However, our population level was too low for this goal to be envisaged.[114]

102. In other words, the collective expulsion of aliens, even in time of peace, was not prohibited; it had been ruled out in this case only for the sake of expediency.

103. The prohibition of such expulsions came much later in the form of a remedy to a regional human rights instrument which was silent on the issue: Protocol No. 4[115]

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[111] Ibid., p. 37, note 1.

[112] See Paul Fauchille, *Traité de droit international public* (Paris, A. Rousseau, 1926), vol. I, 3rd part, *Paix*, pp. 688-689.

[113] See de Boeck, op. cit., p. 471.

[114] Antoine Pillet and Jean-Paulin Niboyet, *Manuel de droit international privé* (Paris, Sirey, 1924) No. 170, p. 213.

[115] Protocol signed in 1963 in Strasbourg, in force since 1968.

to the European Convention on Human Rights, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto. Article 4 of Protocol No. 4 states concisely that "[c]ollective expulsion of aliens is prohibited".

There is a similar provision — with a stylistic difference relating to the use of the singular — in the American Convention on Human Rights, which in article 22, paragraph 9, specifies that "[t]he collective expulsion of aliens is prohibited". The African Charter on Human and Peoples' Rights contains the nearly identical provision in article 12, paragraph 5: "The mass expulsion of non-nationals shall be prohibited."

104. According to the committee of experts responsible for preparing draft Protocol No. 4 to the European Convention, it was necessary to include this provision, which did not appear in the initial draft, so as to prevent the recurrence of mass expulsions "of the kind which had occurred in recent history", as noted in a memorandum of the Directorate of Human Rights of the Council of Europe.[116]

105. Several applications filed with the European Commission of Human Rights to punish States parties to Protocol No. 4 for violating article 4 thereof have been unsuccessful for various reasons, as set out by the Commission in its relevant decisions.[117] The European Court of Human Rights declared that article 4 had been violated in the case of *Čonka and Others v. Belgium*. The applicants were Ján Čonka and his wife and two children. As Slovaks residing in Belgium, where they requested asylum, they were subject to deportation orders issued by the Ministry of Internal Affairs on 18 June 1999 denying their request for asylum and requiring them to leave the territory within five days. The Court noted the following with respect to the deportation orders:

> The only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions of 3 March and 18 June 1999. [...] In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the

[116] Directorate of Human Rights, DH/Exp. (61) 37 of 27 November 1961, mimeograph, *Recueil des «Travaux préparatoires» du Protocole No. 4*, p. 446.

[117] Lochak notes that these clarifications led the Commission to dismiss several applications, including: the application of persons from Suriname who sought asylum in the Netherlands after the coup d'état of 1982 and whose presence the Government of the Netherlands had tolerated, without, however, granting them a residence permit until 1988, at which time, given that Suriname was on the path towards democracy, it notified them of individual decisions requiring them to leave the Netherlands, from which they were ultimately expelled (application No. 14209/88, *Alibaks and Others v. the Netherlands*, decision of 16 December 1988; application No. 14457/88, *B. and Others v. the Netherlands*, decision of 16 December 1988); application of seven members of the Church of Scientology with Swiss nationality residing in Copenhagen who had been expelled following the denial of a renewal of their residence permits. The Commission did not have to express an opinion on the merits, on the grounds that the applicants had not exhausted local remedies and that their application was inadmissible (application No. 12097/86, *Künzi-Brenzikofer and Others v. Denmark*, decision of 13 July 1987). There is no doubt, however, that such an application could not have succeeded on the merits, given that the residence permit is individual and its date of expiry affects its holder individually so that the expulsion at the same time of several persons in this situation could not be considered as a collective expulsion.

> applicants, the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective.[118]

106. The doubt expressed by the Court was reinforced by a series of factors: firstly, prior to the deportation of the persons concerned, the Belgian political authorities had announced that there would be operations to detain aliens and had given instructions to the relevant authorities for the implementation of these operations; secondly, the Court had required all the aliens concerned to report to the police station at the same time; thirdly, the orders requiring them to leave the territory were couched in identical terms; fourthly, it was very difficult for the aliens concerned to contact their lawyers; lastly, the asylum procedure had not been completed. In short, at no stage in the period between the service of the notice to the aliens to report to the police station and their expulsion did the procedure afford sufficient guarantees "demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account. In conclusion, there has been a violation of article 4 of Protocol No. 4 to the Convention".[119]

107. Collective expulsion is based on the sole fact that expelled persons are aliens,[120] and for that reason it is intellectually and morally difficult to accept. The European Commission of Human Rights provided an interesting definition when it considered the application against the plan of the Danish Government to repatriate 199 Vietnamese children sheltered in Denmark. According to the Commission,

> [...] "Collective expulsion" is to be understood as any measure by the competent authorities compelling aliens, as a group, to leave a country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.[121]

108. The second phrase of article 12, paragraph 5, of the African Charter on Human and Peoples' Rights makes a clarification by indicating the groups concerned:

> Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

This clarification, however, has a restrictive meaning of the notion of a group. In fact, collective expulsion may involve a group of persons who are not part of any of the groups mentioned. For example, it is common to speak of "Africans" to refer to nationals of various countries of Africa and consequently to "illegal African immigrants", as if Africa constituted a single State or nation. It is perfectly conceivable that a group of Africans might be subjected to a collective expulsion measure even though they do not constitute a national group, much less an ethnic group, and without there being any religious grounds for such action. It is better, therefore, to maintain the open approach to the notion of group contained in the definition of the European Commission of Human Rights.

109. The idea of examining the individual case of each member of a group of persons subject to expulsion has already been implemented in some mass expulsions in the early twentieth century. For example, when the Government of France

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[118] *Čonka v. Belgium*, Judgment, 5 February 2002, para. 61.

[119] Ibid., para. 63.

[120] See Danièle Lochak, "Commentaire de l'article 4 du Protocole n° 4", in Louis-Edmond Pettiti et al., op. cit., p. 1057.

[121] Quoted by Lochak, ibid., p. 1058.

decided to use its right of expulsion against German nationals after the First World War, "on 12 August 1922, 500 Germans designated by decree were expelled from Alsace and Lorraine".[122] Nevertheless, in the light of the considerations of the aforementioned *Čonka and Others v. Belgium* case before the European Court of Human Rights, can it really be said that it was not a matter of collective expulsion? This is open to doubt, as it is unlikely that the French authorities had considered in a thorough and sufficiently objective manner the individual case of each of the 500 expelled persons.

110. It should be noted, however, that the need for separate consideration of the various cases and individual measures for each of them does not necessarily mean that the competent authorities must reach decisions which vary in substance. The fact that deportation orders are identically worded is not in itself sufficient for them to be regarded as constituting collective expulsion in accordance with relevant international legal instruments, as long as every order is preceded by specific consideration of the situation of each member of the group of persons concerned.[123]

111. This rule on separate consideration of the situation of each person to be expelled, which was not contained in the aforementioned article 4 of Protocol No. 4 but was clearly set forth by the case law of the European Commission of Human Rights, as discussed above, was formally enshrined within the framework of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[124] Article 22, paragraph 1, of this Convention reads as follows:

> Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

112. As we can see, the principle of prohibition of collective expulsion of aliens is enshrined in European, inter-American and African positive regional law; at the international level, it seems to be limited to migrant workers and their families.

113. Does this mean that it is not (yet) a universal rule, deriving from either treaty-based or customary law? The question is worth considering, especially since State practice in this matter seems to vary. The responses of certain States members of the Organization of American States to the questionnaire prepared by the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere is telling in this regard. In answer to the first question, namely "Can any determined group of immigrant workers and their family members be expelled as a group from your country?", some States said "no" outright[125] while the response of others was an outright[126] or tacit[127] "yes".

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[122] See de Boeck, op. cit., p. 469.

[123] See Lochak, op. cit., p. 1058.

[124] Adopted by the United Nations General Assembly in its resolution 45/158 of 18 December 1990. The text of this Convention, which entered into force on 1 July 2003, is included in the United Nations Treaty Series, vol. 2220, No. 39481, p. 3.

[125] Canada, the Dominican Republic, Grenada and Mexico said "no" outright; see progress report of the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere, op. cit., sect. IV (b) (5).

[126] Colombia, Ecuador, Guatemala and Honduras said "yes" outright (ibid.).

[127] Brazil gave a rather lengthy reply in order to obscure the fact that, under its legislation, it is possible to practise collective expulsion: "To determine the expulsion of an alien who is

114. In fact, many States still practise collective expulsion to this day, including in parts of the world where countries are bound by a legal instrument prohibiting it. This is the case in Africa,[128] and in South America[129] as well; and who is to say that this does not happen in Europe?[130]

115. Apart from the (de facto) organized repatriation of refugees living in UNHCR "refugee camps", there is no doubt that such collective expulsions are contrary to the three regional human rights conventions referred to above. Furthermore, it seems reasonable to suggest that there is a general principle of international law on this matter that is "recognized by civilized nations" and prohibits collective expulsion. First of all, it would follow from the fact that if the admission of an alien is an individual right, the loss or denial of this right can only be by an individual act. Second, this rule against collective expulsion is enshrined in three regional human rights conventions that, among them, cover most States members of the international community. After all, Article 38 of the Statute of the International Court of Justice does not require that general principles be recognized by *all* "civilized nations".

(ii) In time of war

116. The question is whether such a principle can be applied in a situation of armed conflict. In past centuries, the practice of collective expulsion of aliens in time of war was not unusual. In the eighteenth century, under the Treaty of Utrecht of 1713 and an Anglo-Russian Treaty of 1760, enemy subjects residing in the territory of belligerent Powers were ordered to leave within a certain time limit. Similarly, in 1798, Congress authorized the President of the United States of America to expel nationals of enemy States under the same conditions.[131]

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lawfully or unlawfully in the country. It is applied to an alien who in any manner poses a threat to national security, political or social order, public morals or the national economy, or whose actions are contrary to the national interest. It is also applied to those who used fraud to enter or remain in Brazil, or who entered the national territory in violation of the law, if they have not left within the prescribed time and their deportation is not desirable, and to those who are engaged in vagrancy or begging or disregard the prohibition established expressly in the Law Governing Foreigners (Article 66 of Law No. 6,815/80, as amended by Law No. 6,965 of December 1981)" (ibid.).

[128] See the examples given in the Preliminary report on the expulsion of aliens, by Maurice Kamto, Special Rapporteur, document A/CN.4/554, 4 April 2005, para. 4, note 6, and para. 27, note 34.

[129] For example, the expulsion, between June and September 1999, of 60,000 Haitians from the Dominican Republic; see progress report of the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere, op. cit., sect. II (a), para. 9.

[130] In his second report, the Special Rapporteur indicated that the French Minister of the Interior and Regional Development had set a goal of removing a minimum of 23,000 aliens in 2005 and noted that 12,849 aliens had been expelled in eight months (A/CN.4/573, para. 20), that on 17 February 2005, the Netherlands parliament had approved by a large majority the Government's decision to expel 26,000 foreigners whose status was irregular, and that Belgium had expelled 14,110 people in 2003 (ibid., para. 22). These figures raise the question of whether such mass expulsions were consistent with article 4 of Protocol No. 4 to the European Convention on Human Rights and with the case law of the European Commission of Human Rights and the European Court of Human Rights cited above. Even assuming that each of the persons concerned was individually expelled, is this not collective expulsion in disguise? For it is doubtful that every single case was given the benefit of a fair and objective examination, as required by the above-mentioned case law.

[131] See Darut, op. cit., p. 37, note 1.

117. In France, the National Convention, which came into power soon after the 1789 revolution and found itself at war with all the European nations except Switzerland, Sweden and Denmark, sought to guarantee domestic security in the midst of agitation by a "foreign faction" supported by "outside enemies". Thus, immediately after the outbreak of hostilities, it decided, by decree of 1 August 1793, to arrest all foreigners from countries at war with the Republic who had been residing in France prior to 14 July 1789. The law of 11 July 1795 (23 Messidor, Year III) decreed the expulsion of all aliens who were nationals of enemy Powers and the arrest of those who did not obey the expulsion order or whose itinerary differed from that indicated in the passports issued to them (art. 4). In addition, a law of 2 August 1795 (15 Thermidor, Year III) declared that the treatment of aliens was too lenient, and thus that "any foreigner who does not comply with the articles of the said law shall be prosecuted and punished for espionage", which, at the time, meant sentenced to death. These could be called "laws of anger" — attributable to "the state of anxiety of a government that had banished moderation from its agenda"[132] — as they were contrary to the humanitarian principles championed by the National Convention.

118. The tendency towards collective expulsion of nationals of enemy countries in time of armed conflict diminished in the following century. As Darut wrote:

> In the nineteenth century, most States which had known the horrors of war, while not overlooking their domestic security requirements, were, to the extent possible, less rigorous about expelling all nationals of the enemy State from their territory.[133]

119. Thus, in 1854, during the Crimean War, Russia decreed that French and English nationals present in Russian territory could continue to reside there, just as they had before the war, and guaranteed them the same security of person and property they had previously enjoyed, provided that they continued to obey the law and carry on their business peacefully.[134] In that same vein, on 4 May 1859, during the war with Italy, the French Government authorized Austrians residing in France to remain there as long as their conduct 'did not give rise to any cause for complaint".[135] On 21 May 1870, a similar statement was issued in the French *Moniteur Officiel*[136] with regard to the Germans. And in 1894, during the Sino-Japanese War, the Japanese Government allowed Chinese nationals residing in Japan to remain there during the period of hostilities, leading their lives as they had in the past; China followed the example of its enemy.[137] Similarly, in 1897, during the war between Greece and the Ottoman Empire over the independence of Crete, the Greek Government did not impose any expulsion measures on the Turks settled in Greece, recognizing their right to continue to live in Greece as long as their conduct did not give rise to complaints; however, Turkey did not have the same attitude: in declaring war, it notified the Greek Government, on 18 April 1897, of an *irade* of the Sultan decreeing expulsion, within 15 days, of all Greeks residing throughout the Ottoman

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[132] See Darut, op. cit., p. 40; and Martini, op. cit., pp. 88-89.

[133] Ibid.

[134] See Darut, op. cit., p. 43; and Martini, op. cit., p. 89.

[135] See Martini, op. cit., p. 88.

[136] Darut, op. cit., p. 43; and Martini, op. cit., p. 89.

[137] On these cases relating to the Sino-Japanese conflict in the nineteenth century, see the information provided by N. Politis in *Revue générale de droit international public*, 1897, p. 525 ff.; see also Martini, op.cit., p. 92.

territory.[138] It should also be noted that during the Transvaal War, from 1899 to 1902, English residents of Transvaal and in Orange Free State were expelled within 48 hours.[139]

120. Do these examples, particularly the attitude of the Turkish Government, imply, however, that the prevailing tendency in State practice at the time was being called into question? Martini writes that:

> Turkey's failure to uphold the law of nations, in 1897, drew protests from the embassies of the major Powers.[140]

121. No one knows whether, in this particular case, the rule in question was the prohibition of collective expulsion, or reciprocity in refraining from the collective expulsion of the nationals of a State at war with the host State for, in this instance, it would seem that Greece honoured that principle but Turkey did not. In any case, it should be noted that during a period where the collective expulsion of aliens who were nationals of a country with which the host country was at war was the order of the day, particularly in France, there was an outcry against a measure perceived as "taking revenge on innocent persons who could not be faulted on any grounds other than being vaguely suspected of spying".[141]

122. One should also take into account that during the Russo-Japanese War, fought in 1904 and 1905 — thus later than all the others mentioned above — Japan accorded the Chinese the same treatment it had during the war of 1894, and, on 10 February 1904, the Japanese Minister of the Interior instructed the authorities in charge of the territorial administrative units to refrain from showing hostility towards Russians, who were authorized to continue residing in the territory of the Empire, and to enter and leave it at will. As for Russia, by order of 14 and 27 February 1904, it, too, allowed the Japanese to continue living there peacefully, under the protection of the law, and to carry on their activities in Russian territory, "with the exception, however, of the Far East territories".[142]

123. It should be noted, however, that even as this tolerance was being practised by States, the quasi-unanimous literature of the day regarded the collective expulsion of foreign nationals of an enemy State as justified and consistent with the law of nations. As Martini wrote:

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[138] See Darut, op.cit., pp. 44-45; and Martini, op.cit., p. 93. Greeks who did not wish to be expelled could remain in Turkey, provided that they permanently gave up their Greek nationality and became Turkish.

[139] See Martini, op.cit., p. 94. The author believes, with regard to this case, that it "would be ill-advised to put this small country — which no longer exists and fought so heroically that it even won the admiration of its adversaries — on trial". Despagnet defended the conduct of the Boërs in this war in *Revue générale de droit international public*, 1900, p. 698.

[140] Martini, op. cit., p. 93.

[141] Fiore, *Nouveau droit international public*, 2nd ed. (translated from Italian by Antoine), vol. 3, No. 12, cited by Martini, op.cit., p. 90, footnote 1.

[142] On the Russo-Japanese War, see, in particular, Francis Rey, *La guerre russo-japonaise au point de vue du droit international* (Paris, Pedone, 1907), pp. 230-232; Henry Bonfils and Paul Fauchille, *Manuel de droit international public*, 5th ed. (Paris, Rousseau, 1908), No. 1055; and Martini, op.cit., pp. 92-93.

> The vast majority of authors on public international law have no difficulty in recognizing the mass expulsion of aliens belonging to an enemy nation as a natural effect of the declaration of war.[143]

It was, in fact, at this time that, in the same vein as Pillet and Niboyet, whose expertise was, admittedly, more in the area of private international law, two eminent internationalists, Bonfils and Fauchille, taught that:

> Mass expulsion, in time of war, is an act of defence and a perfectly lawful and unquestionably appropriate measure. Steps to avoid the risk of aliens staying in the country, prevent the provocations and unrest among the population that their presence could incite and thwart the possibility of dangerous and easily managed espionage, are obviously security measures that a State must be able to take ... Each State should be allowed to carry out mass expulsions of nationals of an enemy country, even if they are legitimately settled in the territory ... .[144]

Agreeing wholeheartedly, Pillet declared in 1891-1892, in a series of lectures on the law of war that he delivered to officers in Grenoble, that a State that offers hospitality "to a considerable number of aliens"[145] is acting "in accordance with a genuine need by expelling these aliens if it goes to war against their homeland. Their mere presence is a grave danger in and of itself".[146]

124. British legal theorists also took a clear-cut position on this matter, as the Special Rapporteur indicated in his second report (A/CN.4/573, para. 112).

125. The world has recently witnessed the practice of collective expulsion of nationals of an enemy State in the 1998 war between Ethiopia and Eritrea. As also indicated in the second report (A/CN.4/573, para. 114), the Eritrea-Ethiopia Claims Commission, citing *Oppenheim's International Law*, noted that international humanitarian law gives belligerents broad powers to expel nationals of the enemy State from their territory during a conflict. The Commission's decision, which could not be appealed, was as follows:

> Ethiopia could lawfully expel these persons as nationals of an enemy belligerent, although it was bound to ensure them the protections required by Geneva Convention IV and other applicable international humanitarian law.[147]

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[143] Martini, op. cit., p. 37.

[144] Bonfils and Fauchille, op. cit., No. 1055. In this connection, see Bry, *Précis élémentaire de droit international public*, 5th ed. (Paris, L. Larose et L. Tenin, 1906), p. 515, No. 381; Robert Piédelièvre, *Précis de droit international public*, vol. 2 (Paris, Pichon, 1894-1895), No. 830; John Basset Moore, *A Digest of International Law*, vol. IV (Washington, D.C., Government Printing Office, 1906), p. 68; and Alexandre G. Mérignhac, *Les lois et coutumes de la guerre sur terre d'après le droit international moderne et la codification de la Conférence de la Haye de 1899* (Paris, A. Chevalier-Marescq, 1903), No. 25.

[145] Here the author makes an exception. In his view, it would be different if a very small number of foreigners were involved: "A State that has only a negligible number of foreigners would do well to refrain from subjecting them to an expulsion that cannot be justified on any grounds. And as it is not at any risk, the State should not even flaunt its generosity ..." See Antoine Pillet, *Le droit de la guerre. Première partie — Les hostilités: Conférences faites aux officiers de garnison de Grenoble pendant l'année 1891-1892* (Paris, Arthur Rousseau, 1892), p. 99.

[146] Ibid., pp. 99-100.

[147] See decision of 17 December 2004 of the Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, Partial Award — Civilian Claims. Eritrea's Claims 15, 16, 23 and 27-32 (The Hague, 17 December 2004), para. 82.

126. It should be noted that this "rule" has no clear support in customary international law. Contrary to the view that cites, with unjustified assurance, "the customary right of a State to expel all enemy aliens at the outset of a conflict",[148] it is evident that the practice in the matter is rather different. Nor is there any basis for this thinking, whatever may have been implied, in international humanitarian law. Quite the reverse, the relevant provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949,[149] tend to support the opposite meaning.

127. In the first place, the first paragraph of article 27 at the beginning of section I (part III), entitled "Provisions common to the territories of the parties to the conflict and to occupied territories", reads as follows:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Alien civilians are considered protected persons under this Convention.

128. Secondly, in section II, entitled "Aliens in the territory of a party to the conflict", article 38 provides as follows: "the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace". Article 40 further stipulates that, if the protected persons "are of enemy nationality, they may only be compelled" to do certain types of work — specified in the article — which are not directly related to the conduct of military operations. Since they can be compelled to work "only to the same extent" as nationals of the party to the conflict in whose territory they are located, like all other protected persons, they "shall have the benefit of the same working conditions and of the same safeguards as national workers".

129. These provisions imply that the legal regime governing civilian persons protected in time of war should be applied generally and without distinction to national and foreign civilians alike, even if the latter are nationals of an enemy State or of a third party to the armed conflict. Thus, in analysing the provisions of article 41, relating to assigned residence or internment, one author wrote that "the fact of being of enemy nationality is not a valid criterion on which to justify internment".[150]

130. It is also significant that the monumental research work on customary international humanitarian law[151] carried out under the auspices of the International Committee of the Red Cross (ICRC) does not contain a single rule, among the 161 rules identified, on the collective expulsion of foreign nationals of an enemy State in

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[148] The Eritrea-Ethiopia Claims Commission, in footnote 27 (para. 81) of the Partial Award of 17 December 2004 (see preceding footnote), refers on this point to Gerald Draper, The Red Cross Conventions, pp. 36-37 (1958), quoted in *10 Digest of International Law*, p. 274 (Marjorie Whiteman, ed., 1968).

[149] United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.

[150] See Oji Umozurike, "Protection des victimes des conflits armés", in *Les dimensions internationales du droit humanitaire*, Pedone/Institut Henry-Dunant/UNESCO, 1986, p. 224.

[151] See Jean-Marie Henckaerts and Louise Doswald-Beck, *Droit international humanitaire coutumier. Volume I: Règles générales*, Bruylant/CICR, 2006.

time of war. At most, one rule (rule 103) can be found, stipulating that "[c]ollective punishments are prohibited". Assimilating, *quod non*, expulsion to a "punishment", or more precisely to a sanction, one can infer from this provision a rule prohibiting the collective expulsion of the type of aliens being considered here.

131. Of course, the distinction between expulsion in time of peace and expulsion in time of war seems to be well founded and, in any case, established in both theory and practice, as the authors of *Oppenheim's International Law* assert. But these authors refer more specifically to a State's right "to expel all hostile nationals residing, or temporary staying, within its territory".[152] It is difficult to say whether the Eritrea-Ethiopia Claims Commission let itself be influenced by this consideration. This idea, however, fits in well with the condition attached — in the aforementioned historical State practice with regard to the collective expulsion of foreign nationals of an enemy State — to the measure or declaration of non-expulsion, namely, that the foreign nationals in question could continue to reside in the State at war with their country and enjoy the necessary protection, provided that they lived there peaceably and did not give rise to any cause for complaint.

132. Given the entrenched positions and qualified formulations described above, one lesson could be drawn from this debate, which has been going on at least since the eighteenth century: that the matter should be tackled prudently, in the light of the progressive development of international law and its main contemporary principles. A number of questions may be raised. Which should prevail: the interest of the State or that of individual persons, even if they are nationals of an enemy State? The collective security interest of the belligerent State or the individual but nonetheless fundamental interest of the alien who is the presumed "enemy" of that State? Is it possible to reconcile these two apparently opposite requirements?

133. These are the questions that must now be answered, given the Special Rapporteur's belief that the right to expel nationals of an enemy State can be examined today only in the light of the progressive development of international law and the fundamental principles of human rights. In fact, the philosophy of human rights and contemporary international law do not allow a State to collectively subject a group of aliens *as such*, whatever its nature and even if it is composed of nationals of an enemy State, to the regrettable consequences of a situation for which they are not responsible, on the sole grounds that they are nationals of that State. Expulsion cannot be used as a preventive weapon against an enemy State or as a means of retaliation against peaceful aliens for a war in which they are not involved and for which they may have no sympathy.

134. In brief, it appears that: (a) there is no rule of international law that requires a belligerent State to allow nationals of an enemy State to remain in its territory,[153] but there is also no rule that requires such State to expel them; (b) the collective expulsion of foreign nationals of an enemy State is practised by some States, to varying degrees, and finds support in most of the literature, both historically and in modern times; (c) this State practice and the literature seem to consider that such expulsion must be allowed only in the case of aliens who are hostile to a receiving State at war with their country. It follows, *a contrario*, that foreign nationals of an

[152] See *Oppenheim's International Law*, op. cit., para. 513, pp. 940-941.

[153] See Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge, Cambridge University Press, 1966), p. 76.

enemy State who are living peaceably in the host State and causing no trouble to that State may not be collectively expelled; their expulsion must obey the ordinary law on expulsion in time of peace, for the lack of hostility on their part removes them from the exceptional situation created by the war with the State of which they are nationals. In this case, it is difficult to agree fully with the view that "a State may nonetheless be justified in expelling such a group without regard to the individual behaviour of its members, if the security and existence of the expelling State would otherwise be seriously endangered, for example ... during a state of war".[154] Such a position appears unacceptable, in view of the requirement of respect for the individual rights of the human person in all circumstances, unless the aliens in question, taken together as a group, carry out activities or display behaviours which are hostile or dangerous to the receiving State.

135. In the light of the foregoing, the following draft article is proposed:

Draft article 7
Prohibition of collective expulsion

1. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited. However, a State may expel concomitantly the members of a group of aliens, provided that the expulsion measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.

2. Collective expulsion means an act or behaviour by which a State compels a group of aliens to leave its territory.

3. Foreign nationals of a State engaged in armed conflict shall not be subject to measures of collective expulsion unless, taken together as a group, they have demonstrated hostility towards the receiving State.

[154] Karl Doehring, "Aliens, Expulsion and Deportation", *Encyclopedia of Public International Law*, 1985, vol. 8, p. 16.